TRANSCRIPT

OF

RECORD

(16,845.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 632.

THOMAS TINSLEY, APPELLANT,

vs.

ALBERT ERICHSON, SHERIFF OF HARRIS COUNTY, TEXAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 28, 1898.

1 In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Beaumont.

In re THOMAS TINSLEY
vs.
ALBERT ERICHSON, Sheriff. } C. L. No. 5. Application for Writ of *Habeas Corpus.*

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular June term of said court, 1897, to wit, on the 7th day of June, A. D. 1897, the Hon. David E. Bryant, judge of the district court of the United States for the eastern district of Texas, presiding, the following proceedings were had and taken in said court, to wit:

2 *Original Application. Filed May* 15, 1897.

THE STATE OF TEXAS, }
County of Harris. }

To the Honorable David E. Bryant, the district judge of the United States for the eastern district of Texas, as a judge of the circuit court of the United States for said district:

Your petitioner, Thomas Tinsley, respectfully represents that he is a subject of the Queen of England and a citizen of Great Britain, and that he complains of Albert Erichson, a citizen and sheriff of Harris county, in the State of Texas; that your petitioner is illegally restrained of his liberty by said sheriff in the county jail of said county by virtue of a certain writ of commitment issued out of the district court of said county by the clerk of said court under and by virtue of a certain judgement of said court of February 6th, 1897, in cause No. 18969, entitled O. C. Drew *et al vs.* The Houston Cemetery Company *et al.*, on the docket of said court.

Your applicant further says that on *the* March 31st, 1896, said Drew and others filed a petition in said district court asking for the appointment of a receiver over the property of the Houston Cemetery Company, a private corporation which owned and maintained a cemetery in the city of Houston, Texas; that it was the principal purpose, among other things, of said receivership to force said corporation at its own expense to build a certain bridge, by means of which said cemetery is reached, and to maintain and improve the grounds, drives, and walks in said cemetery; that the said the district court granted the prayer of said petitioners, and April 23rd, 1896, appointed Wm. Christian receiver of said corporation, and said receiver at once duly qualified and entered upon his duties, and said receivership suit is still pending and undisposed of on the docket of said district court, a trial on the merits of the case and a final judgement of the district court therein no- yet having been obtained.

3 That this applicant was made a party defendant to said suit, both as an officer thereof and in his individual capacity,

but no receivership was asked for as to his individual property, and he and said corporation contested at the hearing of the application for a receiver the appointment of a receiver, and are still so doing, under the conviction and belief that there never has existed and does not now exist any necessity or legal or equitable grounds for such appointment; that your applicant was in said order of appointment of receiver of April 23rd, 1896, ordered and directed by the court to deliver up to said receiver all the property in his possession held as an officer of said company and to which said corporation might be entitled; that thereupon said receiver demanded of this applicant that he turn over under said order all those certain notes described in Exhibit A to the judgement of contempt hereinafter referred to, together with a certain minute book of said corporation and $492.52 in cash, alleged by the receiver to be in the possession of your applicant as an officer of said company and which the receiver claimed to be property the possession of which the company was entitled to. Your applicant declined to turn over or surrender to said receiver said minute book and those notes your applicant held as collateral security on the grounds that he had under the law the title thereto and the right of possession thereof, and thereupon the said receiver filed in said cause and court a motion and information to hold your applicant in contempt.

That your applicant, on February 6th, 1897, in due form answered said motion and set up the facts under oath, showing his title and right of possessions to said property, but said district judge, the Honorable John G. Tod, on last-named date, on such hearing, wrongfully held your applicant in contempt of court and ordered him to turn over all of said property, and to pay a fine of $100.00 as a punishment for his contempt, and that he should be remanded to the custody of the sheriff of Harris county and confined in jail until he should fully comply with said order,
4 and issued a warrant of committment to that effect, a copy of which is hereto attached, marked Exhibit "A."

Your applicant further shows, as he also showed in his answer to said motion, that he has not now and has never had in his possession or control since the appointment of a receiver in said cause was made any of the following notes mentioned in said judgment of contempt, to wit:

Notes of Aug. 7th, 1892, S. M. Williams, $90.00; Aug. 29th, 1892, A. Kramer, $100.00; Oct. 3rd, 1892, W. H. Gill (bal.), $3.00; Oct. 7th, 1892, Mary A. Dirky, $50.00; Nov. 23rd, 1892, Ed. L. Pingry, $11.00; July, 1893, Wm. Harrall, $150.00; Nov., 1893, Dr. Royford, $57.50; Mrs. A. Wilson, Jan., 1894, $15.00; April, 1894, Henderson, $10.00; July, 1894, Fuqua & Perkins, $20.00; Jan., 1895, Susan Harley, $55.00, and January, 1896, A. T. Parker, $7.50, one note.

Your applicant further shows that on April 15th, 1896, the other of said notes mentioned in said judgment of contempt and said minute book were transferred and delivered by the officers and stockholders of said cemetery company to your applicant as a private individual for a valuable consideration fully paid by him, and that your applicant is entitled to retain actual possession of

said property until a valid judgment divesting him thereof be entered in a suit for that purpose duly instituted in a court of competent jurisdiction to hear and determine your applicant's right and title to said property; that such judgment could only be entered after a petition be first filed in a court of competent jurisdiction and a court of the place of your applicant's residence, in Texas; that your applicant would be entitled to have a citation and, if not sued in his own county, a copy of the petition served on him, as required by the Texas statutes; that such petition is prerequisite in order to give the court jurisdiction over the subject-matter contended for and claimed by such receiver, and service of citation is a prerequisite to obtain jurisdiction over the person,

5 and these steps must be takrn before the court can hear and determine the right to property, as to whether same be in your applicant, as he contends, or in said company, as said receiver seeks to contend; that none of said steps have been taken to authorize the court to hear and determine the right of and title to said property, as whether said notes and minute book were justly retained by your applicant or whether your applicant would be required to deliver up and surrender the same to said company without said company first repaying to him the sum of $1,000.00 and interest, as hereinafter explained, for the securement of which payment your applicant holds the note of the company and said notes and book as collateral security, which money your applicant loaned to said company to enable it to carry on its business affairs, to wit, its current expenses, to bury the dead, to prosecute suits, to protect and defend itself against pending litigation, and without which loan and advancement said company in its then financial condition would have been unablo to carry on its said business and comply with the terms and requirements of its charter; that your applicant claims his residence in Texas to be in Travis county, and would be entitled to plead his right to be sued in the county of his residence, and your applicant, being a citizen of Great Britain, would also be entitled to remove said suit for trial into the Federal court, and would also be entitled to set up demurrers, exceptions, plea in abatement, as well as denials and other defensive pleas, as against the petition, and also be entitled to have a jury decide questions of fact as to his possession in good faith of said property, and would be entitled to have his day in court therein; that your applicant's sworn answer to the motion of said receiver to show cause why he should not be held in contempt of court did show such cause, in this, that the right of ownership and possession had never been questioned by the company and had not been heard and determined by any court of competent jurisdiction in any suit brought by the receiver for that purpose; that your applicant's claims to said property is

6 adverse to any pretended claim asserted by such receiver; that before said company or the receiver for it will become entitled to the possession of said minute book and said notes mentioned they would be compelled to repay the balance due to your applicant on said loan, to wit, about $1,000.00 and interest. Your applicant further says authority was given by resolution of the di-

rectors and stockholders of said company on or about February 15th, 1896, to Thomas Tinsley, your applicant, to contract a loan and hypothecate as security therefor the property and assets of said company, including said minute book, and said authority was entered in said minute book and evidenced thereby, and said book was subsequently, on or about April 15th, 1896, delivered to said Tinsley as such evidence to facilitate the making of such loan and a loan of about April 15th, 1896. Your relator further shows that on or about April 23rd said receiver was appointed by the said district court, and that on the following day said order was set aside by the court of civil appeals, at Galveston, and the property of said company was returned to the officers thereof under said order, and said order or a copy thereof will be exhibited to your honor in connection with this application; that on or about April 26th, 1896, while said officers were in full co-trol and management of the affairs of said company, your applicant invested the said trust fund of $492.52 in the vendor's lien notes of said company, as hereinafter more fully explained. Your applicant further shows that prior to April 23rd, 1896, the date of the appointment of a receiver, to wit, April 15th, 1896, the other notes besides those hereinbefore enumerated and said minute book, which were ordered by the said district court to be turned over by your said applicant, if he held same as an officer of the company, to the receiver, were, as aforesaid, delivered to him as a private individual by the said company as collateral security for a note of said company of $1,500.00; that prior to, at the time of, and ever since the appointment of said receiver this applicant has held said notes and minute book as collateral security to said note, and that said company was indebted
7 to him as aforesaid in the amount of said note fore money loaned to said company, and said collateral was turned over to him under a resolution of the board of directors of said company; that said transaction was in every respect in good faith, and the company received the full benefit of the loan evidenced by said $1,500 00 note and is bound thereby; that a copy of said note is exhibited herewith as a part of an application to the supreme court of Texas and asked to be considered as a part of this petition; that by reason of the aforesaid matters and facts your applicant had the legal right to refuse to turn over to the receiver said collateral security.

Your applicant further states that he never came into the actual possession of said $492.52 trust money, but that he gave his receipt therefor to Alfred Wisby, who, as secretary and treasurer of said company, had collected the same and was temporarily the proper custodian thereof and had possession thereof before the appointment of the receiver and the filing of said suit, and who misappropriated same and converted it to his own use; that this applicant gave his receipt to Wisby for same and became thereby, if at all liable for said money, merely indebted to the company or the trust fund for that amount; that when the receiver was appointed as aforesaid your applicant did not have any such fund belonging to the company or the trust fund in his actual possession, either in

his capacity as an officer of the company or as a trustee of the fund or as an individual; that he is amply solvent and has more than sufficient property out of which a judgment for many times the said amount of money could be made, and should said receiver obtain a judgement against him for said money by suit it can be collected under execution.

Your applicant further says that, as appears from his answer to the motion to show cause why he should not be held in contempt, he was the chairman of the board authorized by the charter to
8 invest the trust fund of the cemetery company, and that the charter required said fund to be invested in vendor's liens notes; that the said $492.52 belonging to said fund and claimed to be in your applicant's possession he never actually received, as aforestated, but merely assumed to pay; that he, as required by the charter, invested said $492.52 in vendor's liens notes, to wit, a part of the notes of said company which he held as collateral security to the $1,500.00 note of said company; that he thereby diminished his collateral security to obtain a proper investment of said funds; that he credited the value of said notes on said company's note of $1,500.00; that he was unable, however, to get notes exactly of the amount of $492.52, but in order to make the investment had to put in $7.70 of his own money; that in pursuance of the order of the court to turn over all the property of the company and said trust fund, he ten-ered to the receiver the notes in which he had invested said money, on the condition that the receiver would pay him the difference of $7.70, to which he was entitled, before turning over the said notes; that the receiver refused to make this small payment, and further refused to accept the notes as an investment of the trust fund at all, but demanded the cash in lieu of said notes, and therefore your applicant had the right to retain possession of the notes in which said money was invested until said difference is paid unto him; that, by reason of these facts, if the court should hold that he in law had possession of said $492.52 trust money, by assuming to pay same your applicant invested said money, as it was his duty under the charter to do, and was justified in refusing to turn over the notes until said receiver paid the $7.70 difference; which said receiver has always refused and declined to do.

Your applicant further states that his claim to said property was and is made in good faith, and that he has always believed and does now believe and assert that he had a legal right to the possession of said notes and minute book, and respectfully represents that the said contempt proceedings and the court's judgment therein ordering him to turn over said property and to pay in cash
9 to the receiver said trust fund, and in default thereof to be committed to jail until he complies, are null and void and he is illegally restrained of his liberty by virtue thereof:

1st. Because under the facts appearing in the exhibits to be considered herewith and the allegations herein your applicant was guilty of no contempt.

2nd. Because your applicant is deprived of his liberty and will be, if he submits to the order of this court, of his property without

due process of law, in violation of the Constitution of the United States.

3rd. Because said order of imprisonment as to the $492.52 is in effect and order for imprisonment for debt, contrary to the Federal Constitution.

4th. Because under both the State and Federal constitutions your applicant was entitled to have his claim to the property herein referred to adjudicated in a regular suit in court, with the right of trial by jury.

5th. Because your applicant is restrained of his liberty in violation of the treaty between the United States and Great Britain, which guarantees that a subject of Great Britain shall not be deprived of his property or imprisoned, except by due process of law and according to the law of the land.

6th. Because the order of the court undertakes to confine your applicant for a longer time than is allowed under the statutes of Texas providing for punishment for contempt and in effect condemns him to perpetual imprisonment, contrary to said treaty and the Federal Constitution.

7th. Because said court had no jurisdiction nor power to determine in a contempt proceeding the right to property adversely claimed and possessed by a third person as against the receiver, and such adjudication was *coram non judice* and without due process of law.

Your petitioner exhibits to your honor in connection with this application copies of the petition and answer in said suit of Drew *v.* Houston Cemetery Company, judgment of the court in said *court* appointing a receiver, motion and information of the receiver against your applicant to show cause why he should not be held in contempt, your applicant's answer to said motion and information, the court's order holding your applicant in contempt, and the writ of commitment issued by virtue of said order.

Your applicant further present- with this application and *as* to be considered in connection with it copy of and application for *habeas corpus* which he made to the district judges of Harris county and which was denied by them; also copy of an application which he made before J. M. Hurt, chief justice of the court of criminal appeals of the State of Texas, and which was dismissed by said court, and also copy of an application to the supreme court of the State of Texas and the judgment of said court of criminal appeals and supreme court dismissing said petitions; also a petition for rehearing in the court of criminal appeals and an order of said court overruling said petition for rehearing, and your applicant asks that all these exhibits be considered in passing on this application.

Wherefore your petitioner prays that you issue a writ of *habeas corpus* to said sheriff of Harris county, commanding him to forthwith bring your applicant before your honor, to the end that your applicant may be discharged from such illegal confinement and restraint.

THOMAS TINSLEY.

COUNTY OF HARRIS, }
State of Texas. }

Personally appeared before me, the undersigned authority, Thos. Tinsley, known to me to be the person who executed the foregoing application, and, after being by me first duly sworn, says upon oath that he has read over the foregoing application and signed same, and that the facts therein stated are true.

THOMAS TINSLEY.

Sworn to and subscribed before me this 13th day of May, 1897.

DAVID HANNAH,

[SEAL.] *Notary Public in and for Harris County, Texas.*

11 "EXHIBIT A."

MONDAY, *February 8th*, 1897.

OCTAVIUS C. DREW *et al.* }
vs. } # 18969.
HOUSTON CEMETERY COMPANY *et al.* }

In the matter of William Christian, as receiver herein, informant against Thomas Tinsley, respondent, for contempt, etc.

This 6th day of February, A. D. 1897, came on to be heard in open court the proceedings for contempt of this the district court of Harris county, Texas, against the respondent, Thomas Tinsley, upon the affidavit of said William Christian, as receiver, for a rule to show cause, etc., and the court's rule to show cause thereon, both of February 2nd, 1897, and the answer of said respondent to such rule and the replication of said informant to such answer, both this day filed herein, said respondent meantime having had due, reasonable notice in this behalf and appeared in person and by attorney and announced ready for the hearing, and the court, having hrard such affidavit, rule to show cause, answer, and replication and the evidence adduced, both oral and written, in support of the issue so tendered and joined, as well as the argument of counsel, doth find and declare that the facts set forth in said affidavit and the special plea of said replication are true as concerns the minute-book notes and trust fund of four hundred and ninety-two dollars and fifty-two cents, as hereinafter specified, and that said respondent, under the evidence adduced, has failed to show cause, as required by the answer aforesaid, good or sufficient in law: therefore it is considered by the court, ordered, and adjudged that the said respondent, Thomas Tinsley, is guilty of contempt of this court in having wilfully disobeyed this court's order made and rendered in the above numbered and entitled cause on, to wit, the 23rd day of April, A. D. 1896, appointing William Christian receiver of the property of every description of the Houston Cemetery Company, etc., etc., by failing and refusing to turn over to said William

Christian, as such receiver, after he had taken the oath and given the bond which was approved and duly qualified as such receiver, as required by said order, nothwithstanding due and personal demand made therefor upon him, Thomas Tinsley, by said William Christian, receiver as aforesaid, and though having it then and now within his power and ability to comply, the following-described property of and belonging to said Houston Cemetery Company, covered by such order, to which it was entitled, the same being then and still held and controlled by him, Thomas Tinsley, as an officer of said Houston Cemetery Company, to wit: 1st. The notes belonging to said Houston Cemetery Company as its bill- receivable, then and thereto on hand and covered by and embraced in said order of April 23, 1896, amounting to the sum of fourteen hundred and forty dollars and fifty cents, as shown by schedule marked Exhibit "A," attached to the aforesaid affidavit; which schedule the clerk is directed to record on the minutes in connection herewith and to be taken as a part hereof. 2nd. That certain book belonging to said Houston Cemetery Company and known as its "minute book," then and there on hand and covered by and embraced in said order of April 23, 1896. 3rd. The portion of the trust fund to which said Houston Cemetery Company was entitled under its charter and by-laws which accrued for and during the years A. D. 1894 and A. D. 1895, covered by and embraced in said order of April 23, 1896, amounting to the sum of four hundred and ninety-two dollars and fifty-two cents. And the court doth further consider and adjudge, order and direct, that the said contemptor, Thomas Tinsley, pay to the sheriff of Harris county a fine of one hundred dollars as a punishment for the contempt aforesaid, and that he forthwith turn over and deliver to said William Christian, as receiver aforesaid, the said notes, minute book, and trust fund of four hundred ninety-two — and fifty-two cents as an aid to the enforcement of the aforesaid order
12 of April 23, 1896, and that in default of immediate payment of said fine and of the delivery and turning over forthwith to said William Christian, as receiver aforesaid, of said notes, minute book, and trust fund of four hundred and ninety-two dollars and fifty-two cents, he, the said contemnor, Thomas Tinsley, be imprisoned in the common jail of Harris county, Texas, until he shall pay the said fine of one hundred dollars, as herein directed, and until he shall turn over and deliver to the said William Christian, as aforesaid, the said sheriff affording him, said Thomas Tinsley, a reasonable opportunity to do so, if he shall so desire, the said notes, minute book, and trust fund of four hundred and ninety-two dollars and fifty-two cents, and until he shall pay to the sheriff aforesaid his costs for executing the commitment hereunder or until he shall be discharged by the further order of the court, and that to carry this judgment into effect the clerk of this court do forthwith, under his hand and the seal of this court, issue a commitment in terms of the law, reciting generally the proceedings herein, and to which there shall be attached, as Exhibit "A" thereof, certified copy of the aforesaid order of April 23, 1896, under the seal of this court, and to

which there shall also be attached, — Exhibit "B" thereof, the schedule of the aforesaid notes annexed to the aforesaid affidavit or a copy of such schedule, and the clerk of this *clerk* shall also, in addition to the warrant of commitment, deliver to said sheriff a certified copy of this judgment, to be held by him as a further evidence of his authority for the commitment hereby directed by the court.

JOHN G. TOD,
Judge 11th Judicial District of Texas.

13 EXHIBIT "A."

Copy.

Statement of Bills Receivable Account.

Notes due the Houston Cemetery Comp'y to March 31st, 1896.

1892. Notes due prior to 1892:	Jas. Snowball..	$35 00		
	T. S. Lubbock..	7 50		
	W. T. Walker..	63 00		
	J. A. Kirlick...	20 00		
	Tankersley....	22 50		
				147 00
1892.				
Aug.	7.	S. M. Williams	90 00	
"	29.	A. Kramer	100 00	
Sept.	28.	J. A. Sternenberg	90 00	
Oct.	3.	W. H. Gill, balance	3 00	
"	7.	Mary A. Dirkey	50 00	
Nov.	23.	Ed. L. Pingrey	4 00	
Dec.	—.	Mary Bastian	50 00	
1893.				
Feb'y	—.	W. B. Ransom	20 00	
May	—.	Emma Garloff	100 00	
July	—.	Wm. Hanah	150 00	
Nov.	—.	Dr. Rayford	57 50	
1894.				
Jan.	—.	Mrs. A. Wilson	15 00	
Ap.	—.	Henderson	10 00	
July	—.	Fuqua & Perkins	20 00	
——	—.	Mrs. H. F. Carr	90 00	
Ap'l	—.	Geo. H. Breaker	40 00	
Oct.	—.	W. N. Brown	30 00	
1895.				
Jan'y	15.	Susan Hurley	55 00	
May	—.	Isaac Oliver	75 00	
June	—.	A. C. Wilcox	110 00	
Aug.	—.	Sam. Bagnio	10 00	
Oct.	—.	W. R. Sinclair	55 00	

14

1896.

Feb'y	—. A. F. Parker.....	30 00		
Jan.	—. A. J. Keisling.....	22 50		
				1,277 50
				1,424 50
Ap'l	2/92. W. A. Polk, 90 d'ys..	20 00		
Sept.	3/95. F. W. Pope.....	40 00		
				60 00
	Collected during April, 1896, as near as can be ascertained.....			1,484 50

STATE OF TEXAS,
County of Harris.

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

I, J. B. Williams, clerk of the district court of Harris county, Texas, do hereby certify that the above and foregoing is a true and correct copy of warrant of commitment in the above numbered and entitled cause, as the same appears on record in volume 6, pages 310, 311, and 312 and 313, in my office.

Given undder my hand and the seal of said court, at office, in Houston, Texas, this the 13th day of May, A. D. 1897.

[SEAL.] J. B. WILLIAMS,
Clerk District Court, Harris County, Texas,
By E. H. DUMBLE, *Deputy.*

Endorsements: C. L. No. 5. Thomas Tinsley *vs.* Albert Erichson, sheriff Harris county, Texas. Application for writ of *habeas corpus.* Filed May 15th, 1897. C. Dart, clerk, by H. H. Kirkpatrick, deputy. Fiset and Miller, for petitioner.

15 *Order for Discharge of Thomas Tinsley on Bond.*

Filed May 15th, 1897.

In Circuit Court of the United States, Eastern District of Texas.

In the Matter of Application of THOS. TINSLEY for Writ of *Habeas Corpus.*

Whereas Thomas Tinsley made application to the Honorable David E. Bryant, district judge of said district, as a judge of said circuit court, for the writ of *habeas corpus*, alleging that he is illegally restrained of his liberty by Albert Erichson, sheriff of Harris county, State of Texas, by virtue of a certain writ of commitment

issued out of the district court of said county under a judgment of said court of February 6th, 1897, in cause No. 18969, styled O. C. Drew *et al. vs.* The Houston Cemetery Company *et al.* on the docket of said court:

It is, upon consideration of said application, ordered by the court that said sheriff release and discharge said Tinsley from custody forthwith upon his entering into bond, with surety, in the sum of two thousand dollars for his appearance before said circuit court, in the city of Beaumont, Texas, on 7th day of June, 1897, at 10 o'clock in the forenoon, and that said Tinsley be given reasonable opportunity to make such bond; and it is further ordered that said sheriff show cause before said court, at the same time and place, why said Tinsley's said application be not granted and he be not finally discharged from custody.

It is further ordered that the United States marshal forthwith serve a copy of this order upon said sheriff and subject to the further orders of this court.

This May 15, 1897.

D. E. BRYANT, *Judge.*

(Indorsements:) C. L. No. 5. Filed May 15, 1897. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

16 *Order Modifying and Reforming Order for Discharge of Thomas Tinsley on Bond.*

PARIS, 5, 20, 1897.

Albert Erichson, sheriff Ho. T.:

The order made by me for discharge of Thomas Tinsley on bond is modified and reformed to require you to produce the body of Tinsley before me, at Beaumont, on June 7th next, at 10 a. m., to then show cause why he should not be discharged. You will present this to the clerk at Galveston for his observance.

D. E. BRYANT, *Judge.*

Endorsed: Filed May 21, 1897. C. Dart, clerk, by Geo. H. Burnett, deputy.

17 *Writ to Serve Copy Telegram, Issued May 21, 1897, and Marshal's Return Thereon, Filed May 22, 1897.*

UNITED STATES OF AMERICA, }
Eastern District of Texas. }

In United States Circuit Court, at Galveston.

In re Application of THOMAS TINSLEY for Writ of *Habeas Corpus.*

The President of the United States to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to serve Albert Erichson, sheriff of Harris county, Texas, with the accompanying certified copy of telegram, dated Paris, Texas, May 20, 1897, addressed to Albert Erichson, sheriff, and signed by D. E. Bryant, judge.

Herein fail not, and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 21st day of May, A. D. 1897.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court, E. D. T.,
By GEO. H. BURNETT, *Deputy.*

Marshal's Return.

Received this writ on the 21st day of May, 1897, and executed the same on the 21 day of May, 1897, by delivering to W. M. Baugh, deputy sheriff, Harris county, in person, at Houston, in my district, the accompanying copy of order of court, certified by the clerk of this court.

J. S. WILLIAMS,
U. S. Marshal, Eastern District of Texas,
By E. T. DOROUGH, *Deputy.*

(Indorsements:) United States circuit court, eastern district of Texas. *In re* application of Thomas Tinsley for writ of
18 *habeas corpus.* Writ to serve copy. Issued May 21, 1897. C. Dart, clerk, by Geo. H. Burnett, deputy. Returned and filed 22d day of May, 1897. C. Dart, clerk, by Geo. H. Burnett, deputy. Filed June 7, ——. C. Dart, clerk, by C. Dart, Jr., deputy.

19 *Amended Application for Writ of Habeas Corpus.*

Filed June 7, 1897.

THE STATE OF TEXAS, }
County of Harris. }

To the Honorable David E. Bryant, the district judge of the United States for the eastern district of Texas, as a judge of the circuit court of the United States for said district:

Now comes your petitioner, Thomas Tinsley, and respectfully asks that this amended application for writ of *habeas corpus* be considered in lieu of the application heretofore filed in this matter, and says that your petitioner is a subject of the Queen of England and a citizen of Great Britain; that he resides in Travis county, Texas, and that he complains of Albert Erichson, sheriff of Harris county, Texas, who is a citizen of said State and resides in said county; that your petitioner is illegally restrained of his liberty by said sheriff in the county jail of said county by virtue of a certain writ of commitment, a copy of which is attached as an exhibit to the original application herein and asked to be considered a part hereof, issued out of the district court of said county by the clerk of said court under and by virtue of a certain order of said court of February 6th, 1897, in cause No. 18969, entitled O. C. Drew *et al. v.* The Houston Cemetery Company *et al.*, on the docket of said court.

Your applicant further states that March 31st, 1896, said Drew and others filed a petition in said district court asking for the appointment of a receiver over the property of the Houston Cemetery Company, a private corporation, which owned and maintained a cemetery in the city of Houston, Texas; that it was the principal purpose of said receivership to force said corporation, at its own expense, to build a certain bridge, one of the means by which said cemetery is reached, and to maintain and improve the grounds, drives, and walks in said cemetery, and generally to carry on the business; and said court granted the prayer of said petitioners, and April 23d, 1896, appointed Wm. Christian receiver of said corporation, and said receiver at once duly qualified and entered upon his duties, and said receivership suit is still pending and undisposed of on the docket of said district court, a trial on the merits of the case and a final judgment of the district court therein not yet having been obtained.

That this applicant was made a party defendant to said suit, both as an officer thereof and in his individual capacity, but no receivership was asked in said suit as to his individual property; that he and said corporation contested, at the hearing of the application for a receiver, the appointment of a receiver, and is still so doing, under the conviction and belief that there never has existed and does not now exist any necessity or legal or equitable grounds for such appointment; that your applicant was in said order of appointment of April 23rd, 1896, ordered and directed by the court to deliver up to said receiver all the property of said company in his possession, held as an officer of said company and to which said corporation might be entitled; that thereupon said receiver demanded of relator that he deliver up all those certain notes described in said writ of commitment, together with a certain minute book of said corporation and $492.52 in cash, claimed by the receiver to be in the possession of relator as an officer of said company, and that the company was entitled to the possession of the same; that relator declined to deliver up any of said property for the reasons hereinafter appearing, and thereupon the said receiver filed in said cause and court a motion and information to hold relator in contempt, a copy of which is hereto attached as Exhibit "A."

That relator in due form and time answered said motion by a sworn answer, a copy of which is attached hereto as Exhibit B, and alleged that he never had in his possession or control since the appointment of the receiver any of the following notes mentioned in said motion and writ, to wit:

Notes of Aug. 7th, 1892, S. M. Williams, $90.00; Aug 29th, 1892, A. Kramer, $100.00; Oct. 23rd, 1892, W. H. Gill (bal.), $3.00; Oct. 7th, 1892, Mary A. Dirkey, $50.00; Nov. 23rd, 1892, Ed. L. Pingry, $11.00; July, 1893, Wm. Harrell, $150.00; Nov., 1893, Dr. Royford, $57.50; Jan., 1894, Mrs. A. Wilson, $15.00; April, 1894, Henderson, $10.00; July, 1894, Fuqua & Perkins, $20.00; Jan., 1895, Susan Harley, $55.00, and Parker, Jan'y, 1896, $7.50.

Relator in his said answer further showed that he never came

into the actual possession of said $492.52, trust money, but that he gave his receipt therefor to Alfred Wisby, who was secretary and treasurer of said company, and as such had collected same and was temporarily the proper custodian thereof and had possession thereof before the appointment of the receiver and the filing of said suit, and who had misappropriated same and converted it to his own use; that relator gave his receipt to Wisby for same and became thereby, if at all liable for said money, merely indebted to the company or the trust fund for that amount; that when the receiver was appointed, as aforesaid, relator did not have any such fund belonging to the company or the trust fund in his actual possession, either in his capacity as an officer of the company or as trustee of the fund, or as an individual; that relator was chairman of the board authorized under the charter of the company to invest the trust fund of the cemetery company, and that the charter required said trust fund to be invested in vendors' lien notes; that the said $492.52 belonging to said fund and claimed to be in relator's possession he merely assumed to pay, but that considering that he thereby became liable therefor he, as required by the charter of the company, invested same in vendors' lien notes, to wit, a part of the notes of said company which he held as collateral security to the $1,500.00 note of said company herein mentioned; that thereby he diminished his collateral security to obain a proper investment of said fund; he credited the value of said notes on said company's note of $1,500.00; that he was unable, however, to get notes exactly of the amount of $492.52, and in order to make the investment had to put in $7.70 of his own money; that in pursuance of the order of the court to
22 turn over all the property of the company and said trust fund he tendered to the receiver the notes in which he had invested the said money on the condition that the receiver would pay him the difference of $7.70, to which he was entitled, before turning over the said notes; that the receiver refused to make this small payment, and, further, wholly refused to accept the notes as an investment of the trust fund at all, but demanded the cash in lieu of said notes, and therefore relator had the right to retain possession of the notes in which said money was invested until said difference was paid unto him; that on or about April 23rd said receiver was appointed by the said district court, and that on the following day said order was set aside by the court of civil appeals at Galveston, and the property of said company was returned to the officers thereof under said order, a copy of which order is attached hereto as Exhibit C; that on or about April 26th, 1896, while said officers were in full control and management of the affairs of said company, your applicant invested the said trust fund of $492.52 in vendors' lien notes of said company aforesaid; that by reason of these facts, if the court should hold that relator in law had possession of said $492.52, trust money, by assuming to pay same, he invested said money as it was his duty under the charter to do, and was justified in refusing to turn over notes until said receiver paid the $7.70 difference, which said receiver has always refused and declined to do, and was

further justified in refusing to turn over the cash in lieu of said notes, and was therefore guilty of no contempt.

Relator in his said answer further showed that on or about the 15th of April, 1896, prior to the appointment of the receiver, the said company, by a resolution of its board of directors, made its note, hereto attached as Exhibit C, for $1,500.00 to Charles Tinsley, a broker, to be sold by him in open market, in order to raise money that the company was in pressing need of; that said note was sold by said Charles Tinsley to your relator for its face value, and there was attached as collateral security to the note,
23 under said resolution of the board of directors, said minute book of the company, and the other notes mentioned in said motion, to show cause as being in relator's possession, except those specially named hereinbefore; that relator obtained said note and collateral in good faith and the company obtained full consideration for same, to wit, its face value, and relator has ever since said time held said note and the collateral attached thereto as a claim against the company, and has always been willing, and so stated to said receiver, to turn over the collateral upon the payment of the note and now here offers to do so; that the receiver not only declined to pay said note or any part of same, but stated that said note was no valid claim against the company, and relator was justified in retaining the collateral to the note until the note is discharged and was guilty of no contempt in so doing.

Relator further says that authority was given by resolution of the directors and stockholders of said company on or about February 15th, 1896, to Thomas Tinsley, your applicant, to contract a loan and hypothecate as security therefor the property and assets of said company, including said minute book, and said authority was entered in said minute book and evidenced thereby, and said book was subsequently, on or about April 15th, 1896, delivered to said Tinsley as such evidence to facilitate the making of such loan and a $1,500.00 loan of about April 15th, 1896.

Relator says that by reason of the premises he was entitled to retain actual possession of the property ordered to be delivered by him to the receiver until a valid judgment divesting him thereof be entered in a suit for that purpose, duly instituted in a court of competent jurisdiction to hear and determine his right and title to said property; that such judgment could only be entered after a petition be first filed in a court of competent jurisdiction and a court of the place of your relator's residence in Texas; that relator would be entitled to have a citation and, if not sued in his county, a copy of the petition served on him, as required by the Texas statutes, and such petition is
24 prerequisite in order to give the court jurisdiction over the subject-matter claimed by such receiver, and service by citation is prerequisite to obtain jurisdiction over the person, and these steps must be taken before the court can hear and determine the right to said property, as to whether same be in relator, as he contends, or in said company, as said receiver seeks to contend; that none of said steps have been taken to authorize the court to hear

and determine the right of and title to said property, or whether same was justly retained by relator, or whether relator would be required to surrender same to said company without said company first repaying him the amount of said note, with interest, for the securement of which payment relator holds the note of the company and said notes and book as collateral security; that said money relator loaned to said company in order to enable it to carry on its business affairs, to wit, its current expenses, to bury the dead, to prosecute suits, to protect and defend itself against pressing litigation; that without said loan and advancement said company, in its then financial condition, would have been unable to carry on the said business and comply with the terms and requirements of its charter; that relator claims his residence in Texas to be in Travis county and would be entitled to plead his right to be sued in the county of his residence, and, being a citizen of Great Britain, would also be entitled to remove such suit for trial into the Federal court, and would also be entitled to set up demurrers, exceptions, pleas in abatement, as well as denials and other defensive pleas, as against the petition, and also be entitled to have a jury decide questions of fact as to his possession in good faith of said property, and an appeal, and would be entitled to have his day in court therein; that relator's sworn answer to the motion of said receiver to show cause why he should not be held in contempt of court did show such cause, in this, that the right of ownership and possession in and to said property claimed by the receiver had never been questioned by said company and had not been heard and determined in any court of competent jurisdiction in any suit brought by the receiver for that purpose, and relator's claim to said property is adverse to any pretended claim asserted by such receiver.

Relator further states that his claim to said property was and is made in good faith, and that he has always believed and does now believe and assert that he has a legal right to refuse to pay over said $492.52, and to retain possession of said notes and minute book, and respectfully represents that said contempt proceedings and the court's order therein requiring him to turn over said property and to pay in cash to the receiver said trust fund, and in default thereof to pay a fine of $100.00 and be committed to jail until he complies, are null and void and *was* rendered without jurisdiction of the court, and he is illegally restrained of his liberty by virtue thereof:

1st. Because under the facts relator was guilty of no contempt.

2nd. Because relator is deprived of his liberty and will be, if he submits to the order of the court, deprived of his property without due process of law, in violation of the Constitution of the United States and the 14th amendment thereto, and to the right to the equal benefits of the law with citizens of the State, contrary to said Constitution, and said order impairs the obligation of relator's contract with said company and therefore contrary to said Constitution.

3rd. Because said order of imprisonment as to the $492.52 is in

effect an order for imprisonment for debt, contrary to the State constitution.

4th. Because under both the Federal Constitution and the constitution of Texas relator was entitled to have his claim to said property ordered delivered up by him adjudicated in a regular suit in court, with all the rights incident to such suits.

5th. Because relator is restrained of his liberty in violation of the treaty between the United States and Great Britain,
26 which guarantees that a subject of Great Britain shall not be deprived of his property or imprisoned except by due process of law and according to the law of the land.

6th. Because the order of the court undertakes to confine relator for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and in effect condemns him to perpetual imprisonment, contrary to said treaty and the Federal Constitution.

7th. Because said court has no jurisdiction nor power to determine in a contempt proceeding the right to property adversely claimed and possessed by relator against the receiver, and such adjudication was without due process of law and was *coram non judice.*

Relator further asks to be considered in connection with this application a copy of an application for *habeas corpus* which he made to the district judges of Harris county, which was denied by them; also copy of application which he made before court of criminal appeals of the States of Texas, and which was dismissed by said court; also application to the supreme court of the State of Texas and the judgment of said court of criminal appeals and supreme court dismissing said petitions; also a petition for rehearing in the court of criminal appeals, and an order of said court overruling said petition for rehearing.

Wherefore your petitioner prays that you issue a writ of *habeas corpus* to said sheriff of Harris county, commanding him to forthwith bring your applicant before your honor, to the end that your applicant may be discharged from such illegal confinement and restraint.

THOMAS TINSLEY.

Personally appeared before me Thomas Tinsley, who, being sworn, says that he is the identical person who signed the foregoing application, and further says that the facts stated therein are true.

THOMAS TINSLEY.

Sworn to and subscribed by said Thomas Tinsley before *before* me this 7th day of June, 1897.

[SEAL.] C. DART, *Clerk.*

27 THURSDAY, *April 23rd*, 1896.

O. C. DREW *et al.*
vs.
THE HOUSTON CEMETERY CO. } No. 18969.

This 23rd day of April, A. D. 1896, after reasonable notice to and appearance by the defendants, and after hearing the argument of the attorneys for the respective parties, upon reading and considering the verified petition in this cause, together with all the evidence, to wit, the counter-affidavit of T. R. Franklin, attached to petition, and of W. D. Cleveland, W. S. Wall, and Chas. Syfan, adduced in support thereof, and also the sworn answers of the defendants, together with their evidence, to wit, the counter-affidavit of Thos. Tinsley and F. P. Noland, adduced in support thereof, and on motion of the counsel for the plaintiffs, because it is the opinion of the court that there is a reasonable probability of the plaintiffs obtaining relief at the final hearing, and that the property the subject of the suit is in immediate danger, making it necessary for the court to take the same into its custody in order to its preservation: It is ordered by the court that William Christian be, and he is hereby, appointed receiver of this court of all and singular the property, assets, rights, and franchises of the defendant The Houston Cemetery Company of every description, including all money, claims in action, credits, bonds, stocks, leasehold interests, or operating contracts, and other assets of every kind, and all other property, real or personal or mixed, held or possessed by said company, and also of the trust fund described in the plaintiffs' petition as purporting to be loaned to said company and secured by a mortgage deed of trust, together with the accretions thereto since accruing or to accrue; to have and to hold the same as an officer of and under the order and direction of this court. The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, upon taking the oath and executing a bond, with three or more good and sufficient sureties to be approved by this court, in the terms and conditioned as required by
28 law, in the sum of five thousand ($5,000.00) dollars. Said receiver is hereby invested with all the powers usual or incidental to his office, and he is hereby specially authorized and directed to carry on and continue the business of said defendant, The Houston Cemetery Company, and to take all such steps, perform all such acts, and make all such expenditures, and incur all such liabilities as may be reasonably necessary to maintain said company's cemetery property in a reasonable state of preservation for the uses and purposes of a cemetery, including the repair or construction of such bridge or bridges as may be necessary to that end, and also the obtaining of such supply of water at reasonable cost as may be necessary to prevent the waste, decay, or destruction of such cemetery property or any part thereof, and to protect the franchises of

said corporation from forfeiture from acts of non-user or misuser. The said receiver is also specially authorized and directed to collect, by suit or otherwise, and to preserve, and to invest said trust fund in accordance with the trusts thereof, but no investments to be made without confirmation of the court. The said receiver is also specially authorized and directed to make such sales and transfers for cemetery purposes of the unsold lots in said cemetery as may become necessary from time to time, subject to such reasonable rules and regulations as may be agreed upon or determined by the court. Each and every of the officers, directors, agents, and employés of the said Houston Cemetery Company are hereby required and commanded forthwith, upon demand of the said receiver, to turn over and deliver to the *such* receiver any books, papers, moneys, or deeds, or property, or vouchers for the property under their control to which corporation is entitled or which they hold or control as such officers, directors, agents, or employés. Said receiver is hereby fully authorized to institute and prosecute all such suits as he may deem necessary, and to defend all such actions instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any suits against the said The Houston Cemetery
29 Company; and the court reserves all questions concerning the issuance of preliminary injunctions in this behalf without prejudice to the plaintiffs, and also reserves the right, by orders hereinafter to be made, to in all respects regulate and control the conduct of said receiver.

The defendants each and all except to the foregoing decree and order, and in open court give notice of appeal to the court of civil appeals of the first supreme district.

O. C. DREW
vs.
THE HOUSTON CEMETERY CO. } No. 18969.

This undertaking, made and entered into the 23rd day of April, A. D. 1896, witnesseth: That we, William Christian, as principal, and J. H. B. House and E. P. Hill, as sureties, do promise and undertake, to and with the clerk of said court, J. R. Waites, and his successors in office, for the benefit of whom it may concern, in the *final* sum of five thousand ($5,000.00) dollars, that the said William Christian will faithfully discharge all the duties of receiver of the said The Houston Cemetery Company in the above numbered and entitled action and obey the orders of the court therein.

WM. CHRISTIAN.
J. H. B. HOUSE.
E. P. HILL.

Approved this twenty-third day of April, A. D. 1896.

S. H. BRASHEAR,
Judge 11th Judicial District of Texas.

I do solemnly swear that I will faithfully perform the duties of receiver in the above numbered and entitled action.

WM. CHRISTIAN.

30 Sworn to and subscribed to before me this 23rd day of April, A. D. 1896.

S. H. BRASHEAR,
Judge District Court, Harris County, Texas.

Wm. Christian having presented his bond and taken the required oath, said bond is now approved and his appointment is made absolute.

S. H. BRASHEAR, *Judge.*

THE STATE OF TEXAS, }
County of Harris. }

O. C. DREW *et al.* }
vs. } No. 18969.
THE HOUSTON CEMETERY CO. }

I, J. R. Waties, clerk of the district court of Harris county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the court appointing William Christian receiver, his bond and confirmation, in the above numbered and entitled cause, as the same appears of record in Minute Book No. 5, on pages 124, 125, and 126, in my office.

Given under my hand and the seal of said court, at office, in Houston, Texas, this the 2nd day of June, A. D. 1896.

[SEAL.] J. R. WATIES,
Clerk District Court, Harris County, Texas,
By G. H. EAAUD, *Deputy.*

31 EXHIBIT A.

OCTAVIUS C. DREW *et al.* } No. 18969. Suit Pending in the
vs. } District Court of Harris County,
HOUSTON CEMETERY CO. *et al.* } Texas.

To the district court of Harris county:

Informing William Christian, in his capacity as receiver for the Houston Cemetery Company, under appointment of this the district court of Harris county, Texas, in the above numbered and entitled cause, depending therein, complaining by this his affidavit against Thomas Tinsley, late of the county of Harris, in the State of Texas, and now sojourning therein, for contempt of the said court in the matter hereinafter specified—

Doth present and show unto the said court as follows, to wit:

That in a certain suit commenced and pending in this the district court of Harris county, Texas, numbered 18969 on the docket thereof, wherein William V. R. Watson, Octavius C. Drew, and Thomas W. House, as intervenor, are plaintiffs and The Houston Cemetery Company, Thomas Tinsley, Alfred Wisby, Charles Tinsley, A. L. Brown, W. T. Watt, and W. M. Sleeper are defendants, in which the amount in controversy was more than five hundred dollars, exclusive of interest and cost, the said district court, Hon. Sam.

H. Brashear, the regular district judge thereof, presiding, afterwards, on, to wit, the 23d day of April, A. D. 1896, made and rendered the interlocutory decree therein, after due and reasonable notice to and appearance and contest by said defendants and each of them, by the terms and provision- of which decree William Christian, then and there a *bona fide* citizen of the State of Texas and qualified to vote therein, and who has ever since then so been and kept and maintained his actual residence within the said State of Texas, was appointed receiver by said court of all and singular the property and property rights and franchies of and belonging to the said defendant, Houston Cemetery Company, then and there a corporation duly created and existing under and by virtue of the laws of the State of Texas, with all such property then and there situated within the said State of Texas, and by the said decree the said receiver as such, upon duly qualifying in that capacity, was then and there directed to take into his official custody and possession, as such receiver, all and singular the property of every nature and description belonging to the said The Houston Cemetery Company in its own right, and also that certain funds set aside by the charter and by-laws of said company as a perpetual and inviolate trust, being then
32 and there ten per — of the proceeds derived from the sale of cemetery lots owned by the said company, and to which the said company is entitled in trust, and by the terms and provisions of this said decree so made and rendered, as aforesaid, each and every officer, directors, agents, and employees of the said company, including the said Thomas Tinsley, who was then and there and had been for several years theretofore the president of the said company, were and each of them was required and commanded fort-with, upon the demand of the said receiver, to turn over and deliver to him, the said receiver, in his capacity as such, any books, papers, monies, deeds, or the property vouchers for such property, under the control of them or any of them, to which said company was entitled, or which they held or controlled as such officers or directors, agents, or employees; to which said decree, upon the record of the proceedings of the said court herein, reference is now made for verification, such terms and provisions being therein manifest.

That pursuant to and in virtue of the appointment so made, as aforesaid, he, the said William Christian, immediately upon the rendition thereof and long prior to the happenings of the matters and things hereafter specified, before entering upon his duties as such receiver aforesaid, was duly sworn to perform them faithfully, and did then and there execute a bond as such receiver, with three good and sufficient sureties, which were then and there approved by the said court appointed him, in the sum fixed by the said court, conditioned that he would faithfully discharge all the duties of receiver in the said action (which was named) and obey the orders of the court therein, and he, William Christian, ever since the taking of said oath and giving of said bond, has been and is now duly qualified and acting receiver in this behalf under the appointment aforesaid.

That he, the said Thomas Tinsley, was when the aforesaid decree

was made and rendered, and when the said receiver qualified as such, and when this court acquired jurisdiction over the property, property rights, and franchises aforesaid, and had been during several years before then, in the custody, control, and management, with the dominating direction and supervision, of all such property, property rights, and franchises, and then and there having it within his control, power, and ability to comply in every respect with the terms and provisions of the afore- decree and as to the par-
33 ticulars and matters of the property thereinafter mentioned.

That when the aforesaid decree was made and rendered and when said receiver qualified as such and when this court acquired jurisdiction over the property, property rights, and franchises aforesaid the said defendant, Houston Cemetery Company, was entitled to the following-described monies, notes, books, and funds which then and there belonged to it, to wit:

1st. The monies belonging to the said corporation then and there on hand and covered by and embraced in said decree, amounting to the sum of three thousand one hundred four dollars and fifty cents, as shown by the books of the said company.

2d. The notes belonging to said corporation, as its bills receivable, then and there on hand and covered by and embraced in said order, amounting to the sum of fourteen hundred forty dollars and fifty cents, as shown by the books of said company and the attached schedule, marked Exhibit A.

3d. That certain book belonging to the said corporation and known as its "minute book," then and there on hand and covered by and embraced in said decree, and also that certain book belonging to said corporation and known as its "bank deposit book," then and there on hand and covered by and embraced in said decree.

4th. The portion of said trust fund to which said corporation was entitled and which is covered by the note of said corporation, amounting to the sum of eight thousand two hundred eighty-five dollars and fifty-one cents, and also that portion of said trust fund which accrued for and during the years A. D. 1894 and A. D. 1895, amounting to the sum of four hundred and ninety-two dollars and fifty-two cents, as shown by the books of said company to have so accrued, and also the sum of six hundred and ninety-five dollars, which arose from assessments in perpetuity, belonging to said trust fund, but not placed to its credit, as shown by the books of the said company. Before the filing or presentment thereof he, the said William Christian, as receiver aforesaid, made demand, in the city of Houston, State of Texas, of him, the said Thomas Tinsley, who then and there had it within his power to comply, in obedience to the aforesaid decree, in writing, that he, said Thomas Tinsley, turn over and deliver to him, said William Christian, as receiver afore-
said, as required to do by the aforesaid decree, the monies,
34 notes, books, and funds hereinbefore specified; which demand was unequivocal, particularly specified the subjects thereof, and was accompanied with a duly certified copy of the aforesaid decree, under the seal of the court; which copy was then and there delivered into the hands of him, the said Thomas Tinsley; that,

notwithstanding the decree and demand aforesaid, he, the said Thomas Tinsley, then and there refused compliance therewith, then and there failing to so comply, though having had a reasonable opportunity to do so, in willful and contumacious disobedience of the aforesaid decree.

That by the acts and conduct of him, the said Thomas Tinsley, in failing to obey the said decree in manner and form, as aforesaid, the administration of justice in this behalf has been and will continue to be, until obedience by him is enforced, greatly embarrassed and impedded, and he, the said William Christian, as receiver aforesaid, prevented or impeded in the discharge of his official duty as such receiver, to the detriment and harm of the interest committed to his custody in that behalf.

That when the aforesaid decree was made and rendered he, the said Thomas Tinsley, was not a party to the aforesaid suit, but was actually a party before the court in said cause, then and there present *and* in person and by attorney, and then and there, through his said attorney, contesting the appointment of the aforesaid receiver.

That the aforesaid decree is in full force and effect, not reversed, vacated, or otherwise set aside, and the said cause is *and the said cause is* still pending in this court, and the aforesaid receiver still acting as such herein under the aforesaid appointment, and in the said cause no final decree has yet been entered, made, or rendered.

Wherefore William Christian, in his capacity as receiver aforesaid, informant and affiant herein, moves the court for a rule against him, the said Thomas Tinsley, to be an*f* appear before this honorable court, in the city of Houston, at the court-house thereof, at a time to be fixed by the court, to show cause, if any he can, why he should not be punished for his misconduct in disobeying the aforesaid order in the particulars hereinbefore shown, as for a contempt of this court, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by him with the aforesaid decree in the particulars of disobedience and payment of the costs of this proceeding, and why he should not abide by and perform such other or further orders as the court may lawfully make in the premises, and will ever pray, etc.

WM. CHRISTIAN, *Receiver.*

Sworn to and subscribed before me this 2 day of February, A. D. 1897.

J. B. WILLIAMS,
Cl'k Dist. Ct. of Harris County, Texas,
By C. S. VINSON, *Deputy.*

Upon consideration of the above and foregoing affidavit, copy of which is to be served herewith, it is now ordered by the court that the defendant Thomas Tinsley show cause before the district court of Harris county, at the court-house thereof, in the city of Houston, on the 6th day of February, A. D. 1897, at ten o'clock in the forenoon, why he should not be punished for contempt of this court in

disobeying the decree of this court of April 23, 1896, as described in the foregoing affidavit, by failing of obedience thereto in the particulars shown by such affidavit, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by him therewith in the particulars of disobedience by the aforesaid affidavit and payment of the costs of this proceeding, and why he should not abide by and perform such further or *further* orders as this court may lawfully make in the premises.

Dated at Houston, Texas, this 2nd day of February, 1897.

JOHN G. TOD,
Judge 11th Judicial District of Texas.

36 EXHIBIT A.

Statement of Bill- Receivable Account.

Notes due the Houston Cemetery Company to March 31st, 1896.

1892.	Jas. Snowball	35 00		
	T. S. Lubbock	7 50		
	Note- due prior to 1892: W. T. Walker	63 00		
	J. A. Kirlick	20 00		
	Tankersley	22 50		
				147 00
1892.				
Aug.	7. S. M. Williams	90 00		
"	29. A. Kramer	100 00		
Sept.	28. J. A. Sternenberg	90 00		
Oct.	3. W. H. Gill, balance	3 00		
"	7. Mary A. Dickey	50 00		
Nov.	23. Ed. L. Tingrey	4 00		
Dec.	23. Mary Bastian	50 00		
1893.				
Feb'y	—. W. B. Ransom	20 00		
May	—. Emma Garloff	100 00		
July	—. Wm. Harrall	150 00		
Nov.	—. Dr. Rayford	57 50		
1894.				
Jan.	—. Mrs. A. Wilson	15 00		
Apr.	—. Henderson	10 00		
July	—. Fugna & Perkins	20 00		
——	—. Mrs. H. T. Carr	90 00		
Ap'l	—. Geo. H. Breaker	40 00		
Oct.	—. Wm. N. Brown	30 00		
1895.				
Jan.	15. Susan Hurley	55 00		
May	—. Isaac Oliver	75 00		
June	—. A. C. Wilcox	110 00		
Aug.	—. Sam. Bagnio	10 00		
Oct.	—. W. R. Sinclair	55 00		

1896.				
Feb'y	—. A. F. Parker.....	30 00		
Jan.	—. A. J. Kiesling.....	22 50		
			1,277 00	
				1,424 50
April	2/92. W. A. Polk, 90 days.....	20 00		
Sept.	3/95. F. W. Pope.	40 00		
			60 00	
	Collected during April, 1896, as far as can be ascertained.....		1,484 50	

Copy of within affidavit and rule to show cause received, service accepted, and further or other notice or copy waived this 2d day of February, A. D. 1897, after filing such affidavit.

THOMAS TINSLEY.

37 EXHIBIT B.

In District Court, Harris County, Texas, Feb'y Term, 1897.

O. C. DREW *et al.*
vs.
HOUSTON CEMETERY CO. *et al.* } No. 18969.

Now comes Thomas Tinsley, and in answer to the rule entered herein that he show cause why he should not be punished for contempt, etc., respectfully represents that Alfred Wisby was secretary and treasurer of said company when the receiver was appointed and had been for several years, and had custody and control of the books and funds of said company; that said Wisby collected all the monies due the company and kept the books and accounts, and respondent did not know what monies were paid to said company or what funds should be on hand, except from the statement of said Wisby and from an examination of his books; that respondent ascertained about Feb'y 1st, 1896, that said Wisby had converted the funds of said company to his own use and was short in his accounts. As near as respondent could ascertain, the shortage amounted to $1,250.00; that respondent thereupon demanded a settlement of said shortage, but said Wisby was unable to make same good in cash, but promised soon to do so; and to give him an oppurtunity to pay same, and, further, because it was the best settlement that could be made under the circumstances, it was agreed that he should be credited on the books of said company with said $1,250 as a consideration of two pieces of real estate in Houston owned by him, and he should convey said real estate to said company, which was done, not as an absolute conveyance, but to give said Wigsby an opportunity to pay said amount; that by reason of said transaction, as no money was paid by said Wisby, there was a shortage in the company's funds of $1,250.00; that since receiver took charge other misappropriations by said Wisby of the company's funds have been

discovered, as respondent has been informed and believes, and respondent asks that the testimony of said Wisby filed herein with the report of the special master be considered in passing on the subject of contempt; that respondent has not now and has not had since the appointment of the receiver any moneys of said company, and if the books show $3,104.50 was on hand when the receiver was appointed said money was appropriated by some other person than respondent.

Respondent further says that he has not had the "bank deposit book," but he is informed and believes said book is now and ever since said appointment has been in the Houston Nat'l Bank of Houston, Texas, and same can be had by the receiver asking for it at said bank.

38 Respondent further says he has never had any of the $695.00 of assessments in perpetuity belonging to the trust fund of said company, and that the note of the company for $8,285.51 to Tinsley, as trustee of trust fund, was given in 1893, and in this connection respondent prays the sworn answer of defendant and of respondent filed herein April 14th, 1896, be considered *on* explaining said note.

Respondent further says, in answer to the charge that he has in his possession and has refused to turn over to the receiver the notes of the company, its minute book, and $492.52 of its trust fund, that said Wisby, who had said trust fund, misappropriated same and converted it to his own use, and that April 15th, 1896, respondent, as trustee of said fund, demanded same and Wisby was unable to pay it to respondent; that thereupon respondent, as trustee, gave said company his receipt for said money and thereby assumed liability to pay same, and said company also became liable to him in that amount; that at same time and on consideration of respondent assuming said liability said note of said company for $1,500.00, hereinbefore mentioned, was given to said Tinsley; that in January, 1896, the books of the company showed a considerable amount of money on hand belonging to said company and a dividend was duly and regularly declared, and after the other stockholders received their dividend respondent demanded of said Wisby his dividend; that said Tinsley, as respondent, then and about Feb'y 1st, 1896, first ascertained that said Wisby had misappropriated the company's funds and did not have on hand the money to pay the respondent's dividends by $500.00, and thereupon, about Feb'y 1st, 1896, respondent took said company*ie*'s due bill for $500.00, and said company owed him that amount; that when this suit was filed against said company there *was* no funds on hand with which to employ counsel and pay the expenses of the litigation, while it was necessary to incur such expense; that respondent from time to time, as it was necessary, from the filing of the suit till after the receiver was appointed, advanced said company, for attorneys' fees and such expenses, about $1,000.00, and had he not done so said company could not have defended this suit; that on or about April

39 15th, 1896, at a meeting of the board of directors of said company, a resolution was passed authorizing the execution

of the company's note to the order of Charles Tinsley, who indorsed it over to said Thomas Tinsley, for $1,500.00, to cover said indebtedness of $500.00 for dividend not paid, $492 52 trust fund not received by said Tinsley, for which he was conditionally liable, as aforesaid, and balance of $1,500.00 for attorneys' fees which he had advanced, and further authorized the delivery to the said Tinsley, as collateral security, of said minute book and $1,342½ of the company'- notes, and said $1,500.00 note is exhibited herewith on evidence; that by reason thereof said Tinsley was and is extitled to said collateral security till said note is paid, and if he is not so entitled, he has always believed and now believes he is so entitled, and he has held said collateral in the honest belief that in law he is so entitled to hold it till said note is paid; that said receiver refused when asked by Tinsley to pay said $1,500.00 note and contended that same was not a binding obligation of the company.

Respondent further says that April 26th, 1896, he invested said $492 52 of trust funds in vendors' lien notes, as appears on back of said $1,500.00 note, and he had to pay $7.70 of his own money to make said investment, and he offered to said receiver said notes upon payment to him of said $7.70, and said receiver refused to accept same upon that condition; that respondent is entitled to receive said $7.70 upon turning over said note and he is now willing and has always been willing to turn over same upon such payment. Respondent says that he has no other notes of said company, except those given — collateral, and he has no other property of said company, except said minute book, and he is willing and always has been willing to turn same over to the receiver upon payment of the note for which they are collateral, and he honestly believes he is entitled to the same till said note is paid. Respondent says that he has acted in good faith in this matter and has not intended any contempt of the court or disobedience of the order and he does not believe he has been guilty of same; that if he has erred it has been a mistake as to his legal rights, which he has sought to guard and protect.

Wherefore he respectfully asks that the rule *nisi* be set aside and he be discharged with his costs.

THOMAS TINSLEY.

Personally appeared before me Thos. Tinsley, who, being sworn, says the foregoing answer *answer* is true, so far as it purports to state *forth*, and he believes it to be true so far as it purports to be upon information and belief.

Sworn to and subscribed before me this Feb'y 6th, 1897.

JOHN B. WILLIAMS,
Clerk D. C., H. Co.
S. LYLE, *Dep'ty.*

41 In District Court, Harris County.

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY } No. 18969.

And now comes William Christian, as receiver in this behalf, and excepts to the answer of the respondent Thomas Tinsley, filed herein February 6th, 1897, to the rule of the court of February 2, 1897, to show cause against the punishment for contempt, and says the same is insufficient in law to show cause as required, and of this he prays judgement, etc.

And this repliant, not waiving, but insisting on, said exception, further replying, if required, doth traverse each and every allegation in said answer and says the same are not true in manner or form or substance as therein aver-ed, and of this he prays inquiry, etc.

And further specially replying, this repliant says that this court had acquired jurisdiction of the entire property of said Houston Cemetery Company before the pretended deposit of the notes and book as collateral, as set forth in said answer, and same was void and — no effect as against the court's order herein, for contempt of which said respondent stands herein ruled; and this he is ready to verify, etc.

WM. CHRISTIAN, *Receiver.*

STATE OF TEXAS, }
Harris County. }

I, John B. Williams, clerk of the district court in and for Harris county, hereby certify that the above and foregoing is a true and correct copy of the original affidavit for a rule to show cause, the order to show cause, the acceptance of service thereof, the answer thereto, and the replication to such answer in the matter of William Christian, as receiver, informant, against Thomas Tinsley, respondent, for contempt, etc., in cause No. 18969, entitled Octavius C. Drew *et al. vs.* Houston Cemetery Company *et al.*, pending in said court, as the above appears of record in the minutes of said court and on file in my office.

[SEAL.]

J. B. WILLIAMS,
Clerk District Court, Harris County,
By E. H. DUMBLE, *D'p'ty.*

42 EXHIBIT C.

$1,500.00. HOUSTON, TEXAS, *April 15th*, 1896.

On demand, for value received, I, we, or either of us, jointly and severally, promise to pay to the order of Charles Tinsley one thousand & five hundred dollars, payable at his office, in the city of Houston, for value received, with interest at the rate of ten (10) per cent. till paid.

THE HOUSTON CEMETERY COMPANY,
By its President, THOMAS TINSLEY.

No. ——; due ——.
Attested: ALF'D WISBY, *Sec.*

Having deposited with said Chas. Tinsley, as collateral security for the payment of this note, certain promis-ory notes of different dates, also safe, ledgers & record of the company, and in case this note shall not be paid when due, the holder is hereby authorized to sell the said collaterals or any part thereof at any time thereafter, at public or private sale, without advertising the same or giving any notice, and to apply the net proceeds, after paying all expenses, to the payment of this note; and if at any time before the maturity of this note said collateral should depreciate below the present value, which is today estimated at at least — per cent. more than this debt, the said holder shall have the authority to demand additional security, and if not furnished when so demanded, either in person or through notice left at — place of business or residence or notice through the post-office, the holder is hereby authorized to sell said collaterals at any time thereafter in the manner heretofore stated. It is also agreed that the holder of this note is to retain a full lien on the above-mentioned collateral for any other debt due or to become due by — to the holder hereof. It is further agreed that in case of litigation all court expenses and attorneys' fees shall be paid by the maker of this note.

THE HOUSTON CEMETERY COMPANY,
By THOMAS TINSLEY, *Its President.*

No. ——; due ——.
Attested: ALFRED WISBY, *Sec.*

43 Endorsements.

Chas. Tinsley, without recourse. Thomas Tinsley. Trust fund, [$4]† $[$]†92.52.
492*

Further indorsements.

			April 26, '96.
Geo. Breaker		$47	Sold to trust fund for $47.
Pope, 2 note		40	
Garloff, 1		25	Sold for $25.
Brown, 1		10	
Kiesling, [1]† 2		20	Sold for $30.60.
" [2]†1	[20]†	2½	
Wilcox, 10		100	
Oliver, 1		15	Sold for $82.
" 6		60	
Sinclair, 1		15	
" 3		30	
Parker (3)		22½	
Carr, 9		90	Sold for $102.74.
Kirlick		20	
Snowball		35	
Dickey		45	Sold for $52.88.

[* In pencil in copy.]
[† Figures enclosed in brackets erased in copy.]

Walker	63	
Polk	20	
Bastian	60	Sold for $60.
Lubbock	7½	
Sternberg	90	Sold for $102.
Tankersley	25	
Underwood	500	$502.22 credit April 26, '96.
	$1,342½	

Cr., April 18, '96, paid $7½ on Parker's note. One* On note surrendered by Wisby, leaving three notes to be paid.

44 The State of Texas to the district court of Harris county, Greeting:

Before our court of civil appeals, on the 25th day of April, A. D. 1896, the cause upon appeal to revise or reverse your judgement between Houston Cemetery Company *et al.*, appellants, *vs.* O. C. Drew *et al.*, appellees, No. 1338, appeal from Harris —, and therein our said court of civil appeals made its order in these words:

"On this the 25th day of April, 1896, came on to be heard the petition of the appellant- in this cause for an order of this court to stay the interlocutory judgement of the court below, from which this appeal has been taken, entered in cause No. 18969—O. C. Drew *et al. vs.* The Houston Cemetery Company *et al.*—appointing William Christian receive- over all the property of said company, and said petition having been considered, it is ordered to be set down for hearing by this court on April 29th, 1896, and that in the meantime said interlocutory judgement of the court below and all proceedings thereunder be superseded and stayed, and that all property of said corporation *be* delivered to said receiver or taken by him under said order be forthwith returned. The clerk will certify this order to the court below for its observance and give due notice thereof to said receiver and counsel for plaintiffs below by mailing them certified copies of the same."

Wherefore we command you to observe the order of our said court of civil appeals in this behalf and in all things to have it duly recognized, obeyed, and executed.

Witness the Hon. C. C. Garrett, chief justice of our said
45 court of civil appeals, with the seal thereof annexed, at Galveston, this 25th day of April, A. D. 1896.

[L. S.] H. M. KNIGHT, *Clerk.*

(Endorsed as follows:) No. 1338. Mandate court of civil appeals, Galveston. Houston Cemetery Company *et al. vs.* O. C. Drew *et al.* Issued April 25th, 1896. H. M. Knight, clerk. To Harris county. Filed April 25th, 1896. J. N. Waties, C. D. C., Harris county.

[* In pencil in copy.]

HOUSTON CEMETERY COMPANY, Appellant,
vs.
OCTAVIUS C. DREW *et al.*, Appellees. } No. 1338.

This day came on to be heard the *applicant* of the applicant, Houston Cemetery Company, for a stay of the interlocutory order of the court below appointing a receiver of the property of said corporation pending the appeal from said order, and said application having been heard, it is ordered that the same be denied except in so far as the receiver may be empowered by said order to use the proceeds of the sales of the cemetery lots for the purpose of preserving said property or to repair or construct the bridges mentioned in said order or to obtain a water supply or to incur any liability to be paid out of such proceeds, and to that extent the order of the court below is suspended pending appeal. The clerk of this court will certify the order to the court below for its observance.

I, H. M. Knight, clerk of the court of civil appeals of the first supreme judicial district of the State of Texas, at Galveston, do hereby certify that the above and foregoing one (1) page contains a true and correct copy of the court's order this day entered in cause No. 1338, Houston Cemetery Company *vs.* O. C. Drew, now of record in my office.

46 In testimony whereof I have hereunto set my hand, with the seal of court, this the 29th day of April, 1896.

[L. S.] H. M. KNIGHT, *Clerk.*

(Endorsed as follows:) No. 1338. In court of civil appeals, Galveston. Houston Cemetery Company *vs.* Octavius C. Drew *et al.* Certified copy of orders. Filed April 30th, 1896. J. N. Waties, clerk D. C., H. C.

Endorsements: No. 5. Thos. Tinsley *v.* Albert Erichson, sheriff. Amended application for writ of *habeas corpus.* Filed June 7, '97. C. Dart, clerk.

47 *Order Granting Respondent Leave to File Exceptions, etc. Entered June 7, 1897.*

In re THOMAS TINSLEY. *Habeas Corpus.* C. L. No. 5.

Ordered by the court, upon motion of attorney for respondent, Albert Erichson, as sheriff of Harris county, Texas, who hath, pursuant to this court's order, appeared herein, having with him the body of applicant, that respondent be, and he is hereby, granted leave, before filing a formal return, to file exceptions to and motion to dismiss the application for writ of *habeas corpus.*

48 *Exceptions by Respondent and Motion to Dismiss Appl'n. Filed June 7th*, 1897.

In the United States Circuit Court for the Eastern District of Texas, Beaumont.

Ex Parte THOMAS TINSLEY, Petitioner for *Habeas Corpus.*

And now comes the respondent, Albert Erichson, as sheriff of Harris county, and excepts to and moves to dismiss the application as amended for writ of *habeas corpus* in this behalf and to discharge the court's order to show cause herein for the following reasons, to wit:

1. Because upon the face of the petition of the applicant, Thomas Tinsley, it appears that he is a prisoner in jail under and by virtue of State process upon a final order of commitment in execution for contempt of court, and it does not appear that he is held in custody under or by color of or for or on account of any *any* of the causes that would confer power on a Federal court or judge to discharge him by writ of *habeas corpus.*

2. Because said applicant fails to show, either by the recital therein or exhibits thereto attached, that the judgment from which relief is sought is void, but, on the contrary, if the truth of all the facts is alleged to be conceded, it appears that the State courts has adjudicated all questions of fact here set up to avoid the judgment of conviction, and that petitioner had wilfully placed himself in contempt of such court.

3. Because it appears from said application that the State court had jurisdiction of both the subject-matter and of the person of him, Thomas Tinsley, and that therefore its judgmement of conviction is not void or subject to collateral attack on proceedings in *habeas corpus.*

4. Because it does not appear from said application that the petitioner has complied with the judgement of conviction so far as was within his power to do or as he lawfully ought, and therefore is not entitled to discharge on *habeas corpus.*

EWING & RING,
Attorneys of Record for Respondent.

49 Endorsements: *In re* Thomas Tinsley, petitioner for writ of *habeas corpus.* Exceptions by respondents, Albert Erichson, and motion to dismiss application and writ. Filed June 7, '97. C. Dart, clerk.

50 *Judgment.*

At a Term of the United States Circuit Court for the Eastern District of Texas, at Beaumont.

Hon. David E. Bryant, judge, presiding.

THOS. TINSLEY, Petitioner for Writ of *Habeas Corpus*,
v.
ALBERT ERICHSON, Respondent. } No. 5.

This 7th day of June, A. D. 1897, came on to be heard the petition as amended by the applicant, Thomas Tinsley, for a writ of *habeas corpus* against the respondent, Albert Erichson, as sheriff of Harris county, Texas, upon the exceptions thereto and motion to dismiss same and discharge the order to show cause filed by respondent.

And the court having heard the argument of counsel for both sides and being duly advised, it is considered, ordered, and adjudged by the court that said exceptions and motion be sustained, and that said petition as amended be, and is hereby, dismissed and the order or rule of the court herein to show cause be, and is hereby, discharged, and that the said applicant be, and he is hereby, remanded to the custody of the respondent as sheriff of said Harris county.

It is further ordered by the court that the respondent recover of said applicant all costs in this behalf incurred, for which execution may issue. The applicant in open court excepts to the above judgment and gives notice of appeal.

51 *Prayer for Appeal. Filed January* 21, 1898.

In the Circuit Court of the United States for the Eastern District of Texas, at Beaumont.

THOMAS TINSLEY, Appellant,
against
ALBERT ERICHSON, Sheriff, Respondent. } C. L. No. 5.

The above-named petitioner, Thomas Tinsley, conceiving himself aggrieved by the order entered on June 7th, 1897, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this his appeal be allowed, and that a transcript of the record and proceedings and papers upon which same was made be sent to the Supreme Court of the United States.

FISET & MILLER,
Attorneys for Petitioner and Appellant, Thomas Tinsley.

Allowed Dec'r 29, 1897.
D. E. BRYANT, *Judge.*

(Indorsements:) "C. L. No. 5. Thomas Tinsley, appellant, against Albert Erichson, respondent. Prayer for appeal. Filed Jan'y 21st, 1898. C. Dart, clerk."

52 *Appellant's Assignment of Errors. Filed Jan'y* 21, 1898.

In Circuit Court of the United States for the Eastern Dirtrict of Texas, at Beaumont.

THOMAS TINSLEY, Appellant,
against
ALBERT ERICHSON, Respondent. } C. L. No. 5.

Assignments of error.

Now comes Thomas Tinsley and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the petitioner was restrained of his liberty and was in custody in violation of the Constitution, of the laws, and of a treaty of the United States, and it appears from said petition or application that the petitioner was entitled to the writ.

II.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that he was deprived of his liberty and, if he submitted to the order of the trial court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

III.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that he was denied the equal protection of the laws, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

53

IV.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the petitioner was guilty of no contempt of court in refusing to deliver to the receiver the property in controversy, and that petitioner was entitled to have his claim to said property tried and adjudicated in a regular suit in court, with all the rights and privileges incident thereto, before he could be required by any court to deliver up possession thereof to the receiver or any other person.

V.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the trial court had no jurisdiction or power to determine in a contempt proceeding the right to property adversely claimed and possessed by petitioner against the receiver, and that such adjudication was *coram non judice* and without due process of law, and that the order of the court imprisoning petitioner for his failure to obey that pretended adjudication was in violation of petitioner's rights under the Constitution of the United States, and under the laws thereof, and under the treaty between the United States and Great Britain.

VI.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the petitioner was an alien and a citizen of Great Britain, and was therefore entitled in the proceedings instituted against him to get possession of the property in controversy to have the controversy removed into the Federal court under the laws of the United States relating to such matters, and that petitioner could not be deprived of this
54 right and of the possession of the property by an order of the court to deliver up possession to the receiver under the guise of a contempt proceeding.

VII.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that petitioner, by virtue of the treaty between the United States and Great Britain, was entitled to the same protection under the Federal Constitution and law as a citizen of the United States, and that petitioner should not be deprived of his property or imprisoned except by due process of law and according to the law of the land.

VIII.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of imprisonment as to the $492.52 trust money was in effect an order for imprisonment for debt, contrary to the rights guaranteed to the petitioner under the constitution of Texas.

IX.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of court imprisoning petitioner for contempt was in effect an order for perpetual imprisonment, and undertook to confine him for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and that in this respect the order deprived petitioner of the rights guaranteed to him under said treaty, the Federal Constitution, and the laws and constitution of the State of Texas.

X.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order holding petitioner in contempt of court and requiring him to deliver possession of the property in controversy was void, and that the court
55 had no power nor jurisdiction to pass such an order in the proceedings before the court, and, further, that the court had no jurisdiction over the subject-matter in controversy.

XI.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that petitioner was not in fact guilty of any contempt of court, and that he held no property as an officer of the cemetery company or to which the company was entitled, and it was therefore impossible for him to comply with the court's order.

FISET & MILLER,
Attorneys for Petitioner and Appellant, Thomas Tinsley.

No. 120 West Sixth street, Austin, Texas.

(Indorsements:) "C. L. No. 5. Thomas Tinsley, appellant, against Albert Erichson, respondent. Appellant's assignment of error. Filed Jan'y 21st, 1898. C. Dart, clerk."

56 *Appellant's Appeal Bond. Filed Jan'y* 21, 1898.

In the Circuit Court of the United States for the Eastern District of Texas, at Beaumont.

THOMAS TINSLEY, Petitioner for Writ of *Habeas Corpus*, Appellant, *against* ALBERT ERICHSON, Sheriff, Respondent. } C. L. No. 9.

Know all men by these presents that we, Thomas Tinsley, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto the above-named Albert Erichson, sheriff of Harris county, State of Texas, in the sum of two hundred and fifty ($250 00) dollars, to be paid to the said Albert Erichson, sheriff of Harris county, Texas; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of November, in the year of our Lord 1897.

Whereas the above-named Thomas Tinsley intends to prosecute an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of Texas:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Tinsley shall prosecute said appeal to

effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THOMAS TINSLEY,
By FISET & MILLER,
His Attorneys of Record. [SEAL.]
A. WHEELER. [SEAL.]
W. H. JONES. [SEAL.]

57 Approved, but this bond is not to operate as a supersedeas, and said Thomas Tinsley will remain in the custody of the sheriff of Harris county, Texas.

D. E. BRYANT, *Judge.*

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that in my estimation the sureties on the foregoing bond are good and sufficient for the amount thereof, and if the same were presented to me for approval I would approve the same.

Witness my hand and seal of said court this Dec. 4th, 1897.

[SEAL.] J. H. FINKS, *Clerk.*

(Indorsements:) "C. L. No. 5. Thomas Tinsley, appellant, against Albert Erichson, respondent. Appellant's appeal bond. Filed Jan'y 21st, 1898. C. Dart, clerk."

58 UNITED STATES OF AMERICA, *ss:*

To Albert Erichson, sheriff of Harris county, Texas, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Beaumont, wherein Thomas Tinsley is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the appellant, as in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 29th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

D. E. BRYANT,
United States Judge.

Service on appellee, Albert Erichson, sheriff of Harris county, of a copy of the foregoing citation is hereby waived and service of the same is accepted.

Houston, Texas, January 5th, 1898.

PRESLEY K. EWING,
EWING & RING,
Attorneys for Appellee, Albert Erichson, Sheriff.

(Indorsements:) "C. L. No. 5. Thomas Tinsley, appellant, against Albert Erichson, respondent. Citation on appeal. Filed Jan'y 21st, 1898. C. Dart, clerk."

59 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of the assignment of errors and of all proceedings in the case in cause No. 5 on the law docket of said court, at Beaumont, entitled—

In re THOMAS TINSLEY *vs.* ALBERT ERICHSON, Sheriff of Harris County, Texas,	Application for *Habeas Corpus.*

as the same now appears on file and of record in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 21st day of Jan'y, A. D. 1898.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, Eastern District of Texas.

[Endorsed:] No. 5. United States circuit court, eastern district of Texas. *In re* Thomas Tinsley *vs.* Albert Erichson, sh'ff Harris Co., Texas. Application for *habeas corpus.* Copy of record and proceedings, including allowance of appeal and citation.

60 UNITED STATES OF AMERICA, *ss:*

To Albert Erichson, sheriff of Harris county, Texas, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Beaumont, wherein Thomas Tinsley is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the appellant, as in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal United States Circuit Court, Eastern District of Texas.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 29th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

D. E. BRYANT,
United States Judge.

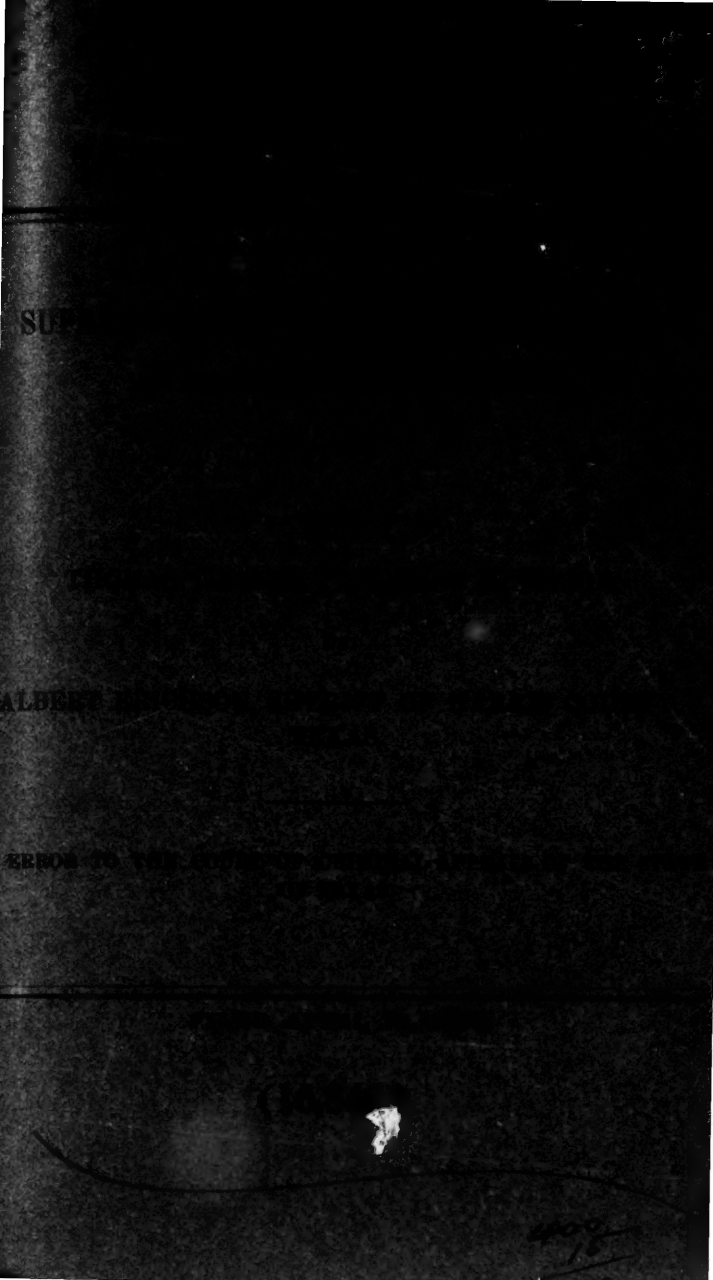
Service on appellee, Albert Erichson, sheriff of Harris county, of a copy of the foregoing citation is hereby waived and service of the same is accepted.

PRESLEY K. EWING,
EWING & RING,
Attorneys for Appellee, Albert Erichson, Sheriff.

Houston, Texas, January 5th, 1898.

[Endorsed:] C. L. No. 5. Thomas Tinsley, appellant, against Albert Erichson, respondent. Citation on appeal. Filed Jan'y 21st, 1898. C. Dart, clerk.

Endorsed on cover: Case No. 16,845. N. Texas C. C. U. S. Term No., 632. Thomas Tinsley, appellant, *vs.* Albert Erichson, sheriff of Harris county, Texas. Filed April 12th, 1898.



(16,846.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 633.

THOMAS TINSLEY, PLAINTIFF IN ERROR,

vs.

ALBERT ERICHSON, SHERIFF OF HARRIS COUNTY, TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 18, 1898.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of criminal appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of criminal appeals of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas Tinsley and Albert Erichson, sheriff of Harris county, Texas, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error has happened, to the great damage of the said Thomas Tinsley, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, during a term of said court then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 31 day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

D. H. HART,
Clerk Circuit Court of United States, Western Dist. of Texas.

Allowed by—
J. M. HURT,
Presiding Judge, Court of Crim. Appeals of the State of Texas.

b [Endorsed:] No. 1227. Fifth assignment. *Ex parte* Thomas Tinsley. Writ of error. Filed in court of criminal appeals at Austin, Texas, February 8th, 1898. E. P. Smith, clerk.

c UNITED STATES OF AMERICA, ss:

To Albert Erichson, sheriff of Harris county, Texas, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of criminal appeals of the State of Texas, at Austin, Texas, wherein Thomas Tinsley is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31 day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

J. M. HURT,
Presiding Judge of the Court of Criminal Appeals of the State of Texas.

Service of the foregoing citation in error is hereby accepted and service of a copy of same upon defendant in error is hereby waived.
Feb'y 9, 1898.

EWING & RING,
PRESLEY K. EWING,
Attorneys for Defendant in Error, Albert Erichson, Sheriff of Harris County, Texas.

d [Endorsed:] No. 1227. Fifth assignment. *Ex parte* Thomas Tinsley. Citation in error. Filed in court of criminal appeals, at Austin, Texas, February 10th, 1898. E. P. Smith, clerk.

1 THE STATE OF TEXAS, }
County of Harris. }

To the Hon. Jno. G. Tod, judge of the 11th judicial district court of Harris county, Texas:

I, Thomas Tinsley, respectfully show and represent to your honor that I am illegally confined and restrained of my liberty by Albert Erichson, sheriff of Harris county, in the county jail of said county, in the city of Houston.

Such confinement and restraint is by virtue of a certain writ of commitment issued out of the civil district court of Harris county by the clerk of said court under and by virtue of a certain judgment of said court made and entered therein on the 6th day of February, A. D. 1897, in cause number 18969, styled Octavius C. Drew *vs.* Houston Cemetery Company *et al.* on the dockets of said court, a copy of which said writ is attached hereto and marked "Exhibit A," and a copy of which said judgment is also attached hereto and marked Exhibit "B," and both of said instruments are made a part of this application.

But this applicant shows to the court that said judgment as well as said writ have always been and now are wholly void for the reasons hereafter set out and alleged, to wit:

The Houston Cemetery Company is a private corporation incorporated under the laws of the State of Texas and domiciled in Harris county, in said State, and this applicant at the dates and times hereinafter mentioned was and still is the president thereof.

That heretofore, on the 23rd day of April, 1896, *that* said corporation was the owner and engaged and had for a long time theretofore maintained and kept up a cemetery near the city of Houston, in Harris county, Texas; that said cemetery contains a large
2 number of burial lots and plats owned by various and divers persons for the purpose of sepulture, and among others owning lots therein are Octavius C. Drew and those joining him in his action, hereinafter set out, and C. H. Melby and Maggie Melby, his wife; that said C. H. Melby is the brother-in-law and Maggie Melby is the sister of the Hon. Jno. G. Tod, by whom the judgment hereinafter and hereinbefore set out was rendered.

That on said last-named date said Drew and others filed a petition in said court asking that a receiver be appointed of and for said corporation, which petition on its face shows and alleges that the plaintiffs therein sue for the benefit of all the lot-owners in said cemetery; that it was the principal purpose of said receivership to build a certain bridge in said cemetery and repair said cemetery and improve its grounds; that the Hon. Sam. H. Brashear, the judge of said 11th judicial district court, granted the prayer of said petitioners and appointed William Christain receiver of said corporation, which said receiver duly qualified and entered upon his duties, and said proceeding is still pending and undisposed of on the docket of said court.

This applicant further shows to the court that in said suit and by said petition he, Thomas Tinsley, and Alfred Wisby, by Charles Tinsley; A. L. Beann, W. T. Watt, and W. M. Sleeper, the officers of said corporation, were made parties defendant therein, and that they, as well as said corporation, contested the appointment of said receiver and are still so doing, and this applicant here states that there never has and does not now exist any necessity or legal grounds for the appointment of said receiver, and that said action, as aforesaid, is still pending and undetermined and there is no final judgment therein, but said receiver was by said court ap-
3 pointed and said officers ordered and directed by the court to turn over to said receiver the property of said corporation belonging thereto; that thereafter, on the 2nd day of February, 1897, said receiver demanded of this applicant that he turn over to him all those certain notes described in Exhibit "A" to the judgment hereto attached and marked Exhibit "B," together with a certain book known as the minute book of said corporation, and $492.52 in cash, which sum he alleged this applicant had in his possession belonging to said corporation; but this applicant declined to turn over or surrender any of said matters or things to said receiver on the ground that he had a good and perfect right

and title thereto and to keep and possess so much thereof as was in his possession, and that said receiver had no legal right to demand or receive the same; whereupon said receiver filed in said cause and court the motion and information hereto attached and marked Exhibit "D," praying that this applicant be required to show cause why he should not be punished for contempt; to which motion this applicant in due form made reply, setting up therein his right and title to said matters and things. This applicant here shows the court that he has not now and has never had in his possession or control since said application for receivership was made any of the following notes mentioned in said judgment, to wit:

Note of Aug. 7th, 1892, by S. M. Williams, for $90.00.
Note of Aug. 29th, 1892, by A. Kramer, for $100.00.
Note of October 3rd, 1892, by W. H. Gill (bal., $3.00).
Note of October 7th, 1892, by Mary A. Dirky, $50.00.
Note of November 23*st*, 1892, by Ed. L. Pingry, $4.00.
Note of July, 1893, by Wm. Harrall, $150.00.
Note of November, 1893, by Dr. Rayford, $57.50.
Note of January, 1894, by Mrs. A. Wilson, $15.00.
Note of April, 1894, by Henderson, $10.00.
4 Note of July, 1894, by Fuqua & Perkins, $20.00.
Note of January, 1895, by Susan Harley, $55.00.
Note of June, 1895, A. C. Wilcox (only bal.), $100.00.
Note of February, 1896, by A. T. Parker (only bal.), $22.50.

This applicant further shows that he, at the date of said motion, *he* had and held and has and now holds the other notes mentioned in said Exhibit "B," and had and held them prior to the appointment of the receiver herein; that he has always held them and still holds them as a private individual as collateral to a $1,500.00 note for money loaned by him to said Co. and has a perfect legal right to the possession thereof.

That said minute book was likewise pledged to him as collateral and security to said $1,500.00 loan and note, and that as against said receiver he had and has a perfect legal right thereto; that each and all of said articles are his personal and private property and not the property of said corporation; that this applicant is amply solvent, and that said receiver has a full and complete remedy at law for the recovery of said property, in case he is legally adjudged to be entitled thereto, notwithstanding which facts, however, said court preemptorily ordered and directed him to turn over said notes and books to said receiver, as will be fully set out and apparent from a copy of said judgment attached hereto and marked Exhibit "D."

This applicant states and shows to the court that he never came into or was in possession of said $492 52 mentioned in said order, and which he is therein ordered to turn over to the receiver, but states and shows to the court that said sum, if ever due by him to said company, was simply assumed by him on behalf of Alfred Wisby, who, as secretary of said company, had theretofore
5 collected and misappropriated said sum; that he owed said money, if at all, to said company as an individual and pri-

vate person and not as an officer of said corporation, and that, as before stated, he is solvent and able to respond in case said receiver should obtain judgment against him. This applicant further states that his claim to all the matters and things above set out was and is made in good faith, and that he has the right and does assert the right thereto until deprived thereof by due course of law, and he says that the proceedings on said motion and said judgment *is* not due process of law, and that he ought not and cannot be by such proceedings imprisoned or compelled to turn over said property and things, for that thereby he is deprived of a trial by due course of law, and that said judgment and commitment are therefore void and his detention thereunder illegal.

This applicant further shows and states that in addition to ordering him to turn over said property, notes, money, etc., the said court on said hearing adjudged him guilty of contempt and undertook by said judgment to impose upon him a fine of one hundred dollars, and to imprison him in said jail until he should comply with said judgment, a copy of which said judgment is hereto attached and made a part hereof and marked Exhibit "B."

But this applicant says that said judgment is and has always been wholly void as well as the commitment thereunder—

1st. For that said John G. Tod, the judge trying said cause, is and was at the date thereof related to said C. H. Melby and Maggie Melby, as aforesaid, by affinity and consanguinity within the prohibited degrees, and that said C. H. Melby and Maggie Melby are directly interested in said litigation and the results thereof.

2nd. Because the said judgment and commitment are un-
6 certain and indefinite and do not limit or fix the time for which your applicant could be confined thereunder, and in this connection he shows the court that he never has been and never would be able to comply with said order, for the reason, as above stated, that — has not possession or control of the notes above set out, and said order, if enforced, would amount to his imprisonment for the term of his natural life.

3rd. Because the statutes of the State provide that the district court shall not have the power to imprison any person for a period any longer than three days for a contempt, whereas said judgment undertakes to confine this applicant for a longer period than three days, and, as a matter of fact, he has already been confined thereunder for thirty-eight days.

4th. Because said matters set up in said motion and judgment do not and could not constitute a contempt.

Wherefore he says that said judgment and commitment are and have always been void and his confinement thereunder illegal.

Wherefore he prays the court to issue a writ of *habeas corpus*, commanding your applicant to be forthwith brought before your honor, to the end that he may be discharged from such illegal confinement and restraint.

THOMAS TINSLEY.

THE STATE OF TEXAS, }
County of Harris. }

Before me, —— ——, a notary public in and for Harris county, Texas, — Thomas Tinsley, who, after by me being duly sworn, on his oath states that he is the identical Thomas Tinsley who makes and signs the foregoing application, and that the facts therein stated as facts are true, and that all other things therein stated he
7 verily believes to be true.

THOMAS TINSLEY.

Sworn to and subscribed before me this March 17th, A. D. 1897.

GEO. A. BYERS,

[SEAL.] *Notary Public in and for Harris County, Texas.*

"EXHIBIT A."

In the District Court of Harris County, Texas.

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY CO. *et al.* } No. 18969.

The State of Texas to the sheriff or any constable of Harris county, Texas:

Whereas the district court of Harris county, at a regular term thereof, in the above numbered and entitled cause made and entered its certain order bearing date April 23rd, A. D. 1896, appointing Wm. Christain —, duly qualified to act, of all and singular the property of every nature belonging to The Houston Cemetery Company, one of the defendants in said cause, and directing that the officers and directors of said company, including Thomas Tinsley, one of the defendants therein, who had appeared before said court before said order was entered, to deliver over to said receiver all and singular said property, a copy of which order, duly certified, accompanies this writ and is attached hereto, marked Exhibit "A;" and whereas said Wm. Christain, as receiver, filed herein February 2nd, 1897, his affidavit for a rule to show cause against said Thomas Tinsley for disobedience of said order, after personal demand on him by said receiver, in failing to turn over and deliver to him, as receiver by the said order, the following property belonging
8 to the Houston Cemetery Company, to wit, the notes belonging to said company as its bills receivable and covered by said order, amounting to fourteen hundred and $\frac{50}{100}$ dollars, as shown by schedule hereto attached and marked Exhibit "B" and made a part hereof.

2nd. That certain book belonging to the Houston Cemetery Company, known as its minute book, and covered by said order.

3rd. The sum of four hundred and ninety-two $\frac{52}{100}$ dollars, that portion of the trust fund to which the cemetery company was entitled under its charter and by-laws and covered by said order, and which accrued for and during the years 1894 and 1895, being shown

by the books of said company. And whereas said district court on, to wit, February 2nd, 1897, after the filing of said affidavit, entered its rule against the said Thomas Tinsley to show cause why he should not be held and punished for a contempt of said court for his disobe*idnece* of the aforesaid order of April 23*th*, 1896, in the particulars hereinbefore recited; and whereas due and reasonable notice was given to him, said Thomas Tinsley, to appear and show cause in that behalf, and due and proper service had for the purpose, he, the said Thomas Tinsley, to wit, February 6th, 1897, appeared before said court in person and by attorney, and the court having heard the pleadings and answers and evidence, with the arguments of counsel in that behalf advanced and presented, do order and adjudge that the said Thomas Tinsley was guilty of a contempt of said court in having willfully disregarded the order hereto annexed, dated April 23rd, 1896, by failing to turn over and deliver to the said William Christain, receiver aforesaid, the hereinbefore-mentioned property and moneys belonging to said cemetery company, after due and personal demand therefor, he, the said Thomas Tinsley, being it then and there and now within his ability and
9 power to comply; and whereas the said court did by the said order so adjudge him, the said Thomas Tinsley, guilty of contempt aforesaid, order and direct that said Thomas Tinsley pay to the sheriff of Harris county, Texas, a fine of $100.00 as punishment for the contempt aforesaid, and that he turn over and deliver to William Christain, as receiver aforesaid, the aforesaid minute book, notes, and the trust fund, amounting to four hundred and ninety-two and $\frac{52}{100}$ dollars, and that in default of immediate payment of fine and of delivery and payment of said minute book and money directed, as aforesaid, to be paid and turned over to said receiver, he be committed to the custody of the jail of Harris county, Texas, and imprisoned therein until full compliance with said order or until the further order of said court, and that commitment issue to carry this judgment into effect:

Now, therefore, we command you to take the body of him, the said Thomas Tinsley, if he is to be found in your county, and commit him to the common jail of Harris county, Texas, and to securely keep and detain him therein under your custody until he shall pay the aforesaid fine of one hundred dollars, as aforesaid, and until he shall turn over and deliver unto the said Wm. Christain, as receiver aforesaid, you giving him oppurtunity, if he so desires, so to do, the aforesaid minute book, notes, and trust fund of four hundred and ninety-two and $\frac{52}{100}$ dollars, and shall have paid the costs of executing this writ or until the further order of this court.

Herein fail not under the penalty of the law, and make due return hereof showing how you have executed the same.

Issued this February 6th, 1897.

Witness J. B. Williams, clerk of the district court of Harris county, Texas, and the seal hereof, at office, in the city of Houston,
10 this 6th day of February, 1896.

J. B. WILLIAMS,
Clerk District Court of Harris County, Texas,
By C. T. VINSON, *Deputy.*

This writ has attached to it copy of original judgment in receivership proceeding, and also copy of schedule attached to Exhibit "B" and asked to be considered as a part hereof.

"EXHIBIT A."

THURSDAY *April 23rd*, 1896.

O. C. DREW *et al.*
vs.
THE HOUSTON CEMETERY CO. } No. 18969.

This 23rd day of April, A. D. 1896, after reasonable notice to and appearance by the defendants, and after hearing the arguments of the attorneys for the respective parties, upon reading and considering the verified petition in this cause, together with all the evidence, to wit, the counter-affidavit- of T. R. Franklin, attached to petition, and of W. D. Cleveland, W. S. Wall, and Chas. E. Syfan, adduced in support thereof, and also the sowrn answers of the defendants, together with all their evidence, to wit, the counter-affidavit- of Thos. Tinsley and F. P. Noland, adduced in support thereof, and on motion of the counsel for the plaintiffs, because it is the opinion of the court that there is reasonable probability of plaintiffs obtaining relief at the final hearing, and that the property the subject of the suit is in immediate danger, making it necessary for the court to take the same into its custody in order to its preservation—

It is ordered by the court that William Christain be, and
11 he is hereby, appointed receiver of this court of all and singular the property, assets, rights, and franchises of the defendant The Houston Cemetery Company of every description, including all money, claims in actions, credits, bonds, stocks, leasehold interests, or operating contracts, and other assets of every kind, and all other property, real, personal, or mixed, held or possessed by said company, and also of the trust fund described in the plaintiffs' petition as purporting to be loaned to said company and secured by a mortgage — deed of trust, together with the accretions thereto since accruing or to accrue; to have and to hold the same as an officer of and under the orders and directions of this court. The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, upon taking the oath and executing a bond, with three or more good and sufficient sureties to be approved by this court, in the terms and conditions as required by law, in the sum of five thousand dollars ($5,000.00). Said receiver is hereby invested with all the powers usual or incidental to his office, and he is hereby specially authorized and directed to carry on and continue the business of said defendant, The Houston Cemetery Company, and to take all such steps, perform all such acts, and make all such expenditures and incur all such liabilities as may be reasonably necessary to maintain said company's cemetery property in a reasonable state of preservation for the uses and purposes of a cemetery, including the repair or construction of such bridge or bridges

as may be necessary to that end, and also the obtaining of such supply of water at reasonable cost as may be necessary to prevent the waste, decay, or destruction of such cemetery property, or any part thereof, and to protect the franchises
12 of said corporation from forfeiture from acts of non-user or misuser. The said receiver is also specially authorized and directed to collect by suit or otherwise and to preserve and to invest said trust fund in accordance with the trusts thereof, but no investment to be made without confirmation of the court. The said receiver is also specially authorized and directed to make such sales and transfers for cemetery purposes of the unsold lots in said cemetery as may become necessary from time to time, subject to such reasonable rules and regulations as may be agreed upon or determined by the court. Each and every of the officers, directors, agents, and employés of the said The Houston Cemetery Company are hereby required and commanded forthwith, upon demand of said receiver, to turn over and deliver to such receiver any books, papers, money or deeds, or property, or vouchers for the property under their control to which such corporation is entitled or which they hold or control as such officers, directors, agents, or employés. Said receiver is hereby fully authorized to institute and prosecute all such suits as he may deem necessary, and to defend all such actions instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any suits against the said The Houston Cemetery Company, and the court reserves all questions concerning the issuance of preliminary injunctions in this behalf without prejudice to the plaintiffs, and also reserves the right, by orders hereinafter to be made, to in all respects regulate and control the conduct of said receiver.

The defendants, each and all, except to the foregoing decree and order, and in open court give notice of appeal to the court of civil appeals of the first supreme district.

13 THE STATE OF TEXAS, }
County of Harris. }

O. C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY. } No. 18969.

I, J. B. Williams, clerk of the district court of Harris county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment appointing receiver in the above numbered and entitled cause, as the same appears of record in my office, in volume No. 5, on pages 124, 125, and 126.

Given under my hand and the seal of said court, at office, in Houston, Texas, this the 17th day of March, A. D. 1897.

J. B. WILLIAMS,
[SEAL.] *Clerk District Court, Harris County, Texas,*
By C. L. VINSON, *Deputy.*

"EXHIBIT B."

MONDAY, *February 8th*, 1897.

At a regular term of the district court in and for Harris county, Texas, held at the court-house thereof, in the city of Houston, this 6th day of February, A. D. 1897.

Present: Hon. Jno. G. Tod, district judge, presiding.

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

In the matter of William Christain, as receiver herein, informant, against Thomas Tinsley, respondent, for contempt, etc.

This 6th day of February, A. D. 1897, came on to be heard in open court the proceedings for contempt of this, the district court of Harris county, Texas, against the respondent, Thomas
14 Tinsley, upon the affidavit of said William Christain, as receiver, for a rule to show cause, etc., and the court's rule to show cause therein, both of February 2nd, 1897, and the answer of said respondent to such rule, and the replication of said informant to such answer, both this day filed herein, said respondent meantime having had due and reasonable notice in this behalf and appeared in person and by attorney and announced ready for the hearing; and the court, having heard such affidavit, rule to show cause, answer, and replication, and the evidence adduced, both oral and written, in support of the issues so tendered and joined, as well as the argument of counsel, doth find and declare that the facts set forth in said affidavit and the special plea of said replication are true as concerns the minute book, notes, and trust fund of four hundred and ninety-two dollars and fifty-two cents, as hereinafter specified, and that said respondent, under the evidence adduced, has failed to show cause, as required, by the answer aforesaid, good or sufficient in law.

Therefore it is considered by the court, ordered, and adjudged that the said respondent, Thomas Tinsley, is guilty of a contempt of this court in having willfully disobeyed this court's order made and rendered in the above numbered and entitled cause on, to wit, the 23rd day of April, A. D. 1896, appointing William Christain receiver of the property of every description of the Houston Cemetery Company, etc., etc., by failing and refusing to turn over to said William Christain, as such receiver, after he had taken the oath and given bond, which was approved, and duly qualified as such receiver, as required by said order, notwithstanding due and personal demand made therefor upon him, Thomas Tinsley, by said William Christain, receiver, as aforesaid, and though having it then and now
15 within his power and ability to comply, the following-described property of and belonging to said Houston Cemetery Company, covered by such order, to which it was entitled, the same being then and still held and controlled by him, Thomas Tinsley,

as an officer of said Houston Cemetery Company, to wit: 1st. The notes belonging to said Houston Cemetery Company as its bills receivable then and thereto on hand and covered by and embraced in said order of April 23rd, 1896, amounting to the sum of fourteen hundred and forty dollars and fifty cents, as shown by the schedule marked Exhibit "A," attached to the aforesaid affidavit; which schedule the clerk is directed to record on the minutes in connection herewith and to be taken as a part hereof. 2nd. That certain book belonging to said Houston Cemetery Company and known as its "minute book," then and there on hand and covered by and embraced in said order of April 23rd, 1896. 3rd. The portion of the trust fund to which said Houston Cemetery Company was entitled under its charter and by-laws, which accrued for and during the years A. D. 1894 and A. D. 1895, covered by and embraced in said order of April 23rd, 1896, amounting to the sum of four hundred and ninety-two dollars and fifty-two cents. And the court doth further consider and adjudge, order and direct, that the said contemnor, Thomas Tinsley, pay to the sheriff of Harris county, Texas, a fine of one hundred dollars as punishment for the contempt aforesaid, and that he forthwith turn over and deliver to said William Christain, as receiver aforesaid, the said notes, minute book, and trust fund of four hundred and ninety-two dollars and fifty-two cents as an aid to the enforcement of the aforesaid order of April 23rd, 1896, and that in default of immediate payment of said fine and of the delivery and turning over forthwith to said William
16 Christain, as receiver aforesaid, of said notes, minute books, and trust fund of four hundred and ninety-two dollars and fifty-two cents, he, the said contemnor, Thomas Tinsley, be imprisoned in the common jail of Harris county, Texas, until he shall pay the said fine of one hundred dollars, as herein directed, and until he shall turn over and deliver to the said William Christain, as aforesaid, the said sheriff affording him, said Thomas Tinsley, a reasonable opportunity to do so if he shall so desire, the said notes, minute book, and trust fund of four hundred and ninety-two dollars and fifty-two cents, and until he shall pay to the sheriff aforesaid his cost for executing the commitment hereunder, or until he shall be discharged by the further order of this court, and that, to carry this judgment into effect, the clerk of this court do forthwith, under his hand and the seal of this court, issue a commitment in terms of the law, reciting generally the proceedings herein, and to which there shall be attached, as Exhibit "A" thereof, a certified copy of the aforesaid order of April 23rd, 1896, under the seal of this court, and to which there shall also be attached, as Exhibit "B" thereof, the schedule of the aforesaid notes annexed to the aforesaid affidavit, or a copy of such schedule, and the clerk of this court shall also, in addition to the warrant of commitment, deliver to said sheriff a certified copy of this judgment, to be held by him as further evidence of his authority for the commitment hereby directed by the court.

JOHN G. TOD,
Judge 11th Judicial District of Texas.

EXHIBIT "A."

Copy.

Statement of Bills Receivable Account.

17 Notes due the Houston Cemetery Company to March 31st, 1896.

1892.	Notes due prior to 1892....	James Snowball.....	35 00
		T. S. Lubbock.....	7 50
		W. T. Walker.....	63 00
		J. A. Kirlicks.....	20 00
		Tankersly.....	22 50
			147 00
1892.			
Aug.	7..... ....S. M. Williams.....		90 00
Aug.	28..... .....A. Kramer.....		100 00
Sept.	28.....J. A. Sternenberg.....		90 00
Oct.	3..... . .....W. H. Gill, bal.....		3 00
Oct.	7.....Mary A. Dirkey.....		50 00
Nov.	23..... ....Ed. L. Pingrey.....		4 00
Dec.	—. .....Mary Bastian.....		50 00
1893.			
Feb'y	—..... ....W. B. Ransom		20 00
May	—.....Emma Golloff.....		100 00
July	—.....Wm. Harral....		150 00
Nov.	—.....Dr. Rayford.....		57 50
1894.			
Jan.	—..... .....Mrs. A. Wilson.....		15 00
Apr.	—..... .....Henderson.....		10 00
July	—..... ..Faqua & Perkins.....		20 00
		Mrs. H. T. Carr.....	90 00
Ap'l	—..... .....Geo. H. Breaker.....		40 00
Oct.	—.....W. N. Brown		30 00
1895.			
Jan'y	15..... ... .Susan Hurley.....		55 00
May	—.... .....Isaac Oliver		75 00
June	—.....A. C. Wilcox.....		110 00
Aug.	—.... .....Sam. Bagino.....		10 00
Oct.	—.....W. R. Sinclair		55 00
1896.			
Feb'y	—.... .....A. T. Parker.....		30 00
18			
Jan.	—.....A. J. Keisling.....		22 50
Ap'l	2/92. .. ..W. A. Polk, 90 days..		20 00
Sept.	3/95..... ....F. W. Pope.....		40 00
			1,277 50
			1,424 50
			60 00
			1,484 50

Collected during April, 1896, as near as can be ascertained.

THE STATE OF TEXAS, }
County of Harris. }

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

I, J. B. Williams, clerk of the district court of Harris county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the decree in the above numbered and entitled cause as the same appears of record in volume No. 6, on pages 310, 311, 312, and 313, in my office.

Given under my hand and the seal of said court, at office, in Houston, Texas, this the 12th day of March, A. D. 1897.

[SEAL.] J. B. WILLIAMS,
Clerk District Court, Harris County, Texas.

"EXHIBIT B."

OCTAVIUS C. DREW *et al.*
v.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969. Suit Pending in the District Court of Harris County, Texas.

To the district court of Harris county:

Informing William Christain, in his capacity as receiver
19 of the Houston Cemetery Company, under appointment of this the district court of Harris county, Texas, in the above numbered and entitled cause, depending therein, complaining by this his affidavit against Thos. Tinsley, late of the county of Harris, in the State of Texas, and now sojourning therein, for contempt of the said court in the matter hereinafter specified—

Doth present and show unto the said court as follows, to wit:

That in a certain suit commenced and pending in this the district court of Harris county, Texas, numbered 18969 on the docket thereof, wherein William V. R. Watson, Octavius C. Drew, and Thos. W. House, as intervenor, are plaintiffs and The Houston Cemetery Company, Thomas Tinsley, Alfred Wisby, Charles Tinsley, A. L. Brown, W. T. Watt, and W. M. Sleeper are defendants, in which the amount in controversy was more than five hundred dollars, exclusive of interest and costs, the said district court, Hon. Sam. H. Brashear, the regular district judge thereof, presiding, afterwards, on, to wit, the 23rd day of April, A. D. 1896, made and rendered its interlocutory decree therein, after due and reasonable notice to and appearance and contest by said defendants and each of them, by the terms and provisions of which decree William Christain, then and there a *bona fide* citizen of the State of Texas and qualified to vote therein and who has ever since then so been and kept and maintained his actual residence within the said State of Texas, was appointed receiver by said court of all and singular the property and property rights and franchises of and belonging to the said defendant, Houston Cemetery Company, then and there a corporation duly created and existing under and by virtue

of the laws of the State of Texas, with all such property
20 then and there situated within the said State of Texas; and by the said decree the said receiver as such, upon duly qualifying in that capacity, was then and there directed to take into his official custody and possession as such receiver all and singular the property of every nature and description belonging to the said The Houston Cemetery Company, in its own right, and also that certain fund set aside by the charter and by-laws of said company as a perpetual and inviolate trust, being then and there ten per cent. of the proceeds derived from sales of cemetery lots owned by the said company and to which the said company was entitled in trust; and by the terms and provisions of the said decree, so made and rendered as aforesaid, each and every of the officers, directors, agents, and employés of the said company, including the said Thomas Tinsley, who was then and there and had been for several years theretofore the president of the said company, were and each of them was required and commanded forthwith, upon demand of the said receiver, to turn over and deliver to him, the said receiver, in his capacity as such, any books, papers, moneys, deeds, or other property, or vouchers for said property, under the control of them or any of them, to which said company was entitled or which they held or controlled as such officers or directors, agents, or employés; to which said decree upon the record of the proceedings of the said court herein reference is now made for verification, such terms and provisions being therein manifest.

That pursuant to and in virtue of the appointment so made, as aforesaid, he, the said William Christain, immediately upon the rendition thereof and long prior to the happening of the matters and things hereinafter specified, before entering upon his
21 duties as such receiver aforesaid, was duly sworn to perform them faithfully and did then and there execute a bond as such receiver, with three good and sufficient sureties, which was then and there approved by the said court appointing him, in the sum fixed by the said court, conditioned that he would faithfully discharge all the duties of receiver in the said action (which was named) and obey the orders of the court therein; and he, William Christain, ever since the taking of said oath and giving of said bond has been and is now the duly qualified and acting receiver in this behalf under the appointment aforesaid.

That he, the said Thomas Tinsley, was when the aforesaid decree was made and rendered, and when the said receiver qualified as such, and when this court acquired jurisdiction over the property, property rights, and franchises aforesaid, and had been during several years before then in the custody, control, and management, with the dominating direction and supervision of all such property, property rights, and franchises, and then and there having it within his control, power, and ability to comply in every respect with the terms and provisions of the aforesaid decree, and as to the particulars and matters of the property hereinafter mentioned.

That when the aforesaid decree was made and rendered, and when said receiver qualified as such, and when this court acquired juris-

diction over the property, property rights, and franchises aforesaid, the said defendant, Houston Cemetery Company, was entitled to the following-described money, notes, books, and funds, which then and there belonged to it, to wit:

1st. The moneys belonging to said corporation then and there on hand and covered by and embraced in said decree, amounting
22 to the sum of three thousand one hundred four dollars and fifty cents, as shown by the books of said company.

2nd. The notes belonging to said corporation as its bills receivable then and there on hand and covered by and embraced in said order, amounting to the sum of fourteen hundred forty dollars and fifty cents, as shown by the books of said company, and the attached schedule marked Exhibit "A."

3rd. That certain book belonging to said corporation and known as its "minute book" then and there on hand and covered by and embraced in said decree, and also that certain book belonging to said corporation and known as its "bank deposit book" then and there on hand and covered by and embraced in said decree.

4th. The portion of said trust fund to which said incorporation was entitled and which is covered by the note of said corporation, amounting to the sum of eight thousand two hundred eighty-five dollars and fifty-one cents, and also that portion of said trust fund which accrued for and during the years A. D. 1894 and A. D. 1895, amounting to the sum of four hundred and ninety-two dollars and fifty-two cents, as shown by the books of said company to have so accrued, and also the sum of six hundred and ninety-five dollars which arose from assessments in perpetuity belonging to said trust fund, but not placed to its credit, as shown by the books of said company.

That heretofore, before the filing or presentment hereof, he, the said William Christain, as receiver aforesaid, made demand, in the city of Houston, State of Texas, of him, the said Thos. Tinsley, who then and there had it within his power to comply in obedience to the aforesaid decree, in writing, that he, said Thomas Tinsley, turn
23 over and deliver to him, said William Christain, as receiver aforesaid, as required to do by the aforesaid decree, the moneys, notes, books, and funds hereinbefore specified, which demand was unequivocal, particularly specified the subjects thereof, and was accompanied with a duly certified copy of the aforesaid decree under the seal of the said court, which copy was then and there delivered into the hands of him, the said Thomas Tinsley.

That, notwithstanding the decree and demand aforesaid, he, the said Thomas Tinsley, then and there refused compliance therewith, then and there failing to so comply, though having had a reasonable oppurtunity to do so, in willful and contumacious disobedience of the aforesaid decree.

That by the acts and conduct of him, the said Thomas Tinsley, in failing to obey the said decree in manner and form as aforesaid the administration of justice in this behalf has been and will continue to be until obedience thereof by him is enforced greatly embarrassed and impeded, and he, the said William Christain, as

receiver aforesaid, prevented or impeded in the discharge of his official duty as such receiver, to the detriment and harm of the interests committed to his custody in that behalf.

That when the aforesaid decree was made and rendered he, the said Thomas Tinsley, was not only a party to the aforesaid suit, but was actually a party before the court in said cause, then and there present in person and by attorney and then and there, through his said attorney, contesting the appointment of the aforesaid receiver.

That the aforesaid decree is in full force and effect, not reversed, vacated, or otherwise set aside, and the said cause is still pending in this court and the aforesaid receiver still acting as such
24 herein under the aforesaid appointment, and in the said cause no final decree has yet been entered, made, or rendered.

Wherefore William Christain, in his capacity as receiver aforesaid, informant and affiant herein, moves the court for a rule against him, the said Thomas Tinsley, to be and appear before this honorable court, in the city of Houston, at the court-house thereof, at a time to be fixed by the court, to show cause, if any he can, why he should not be punished for his misconduct in disobeying the aforesaid order, in the particulars hereinbefore shown, as for a contempt of this court, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by him with the aforesaid decree, in the particulars of disobedience and payment of the costs of this proceeding, and why he should not abide by and perform such other or further orders as the court may lawfully make in the premises, and will every pray, etc.

WILLIAM CHRISTAIN, *Receiver.*

Sworn to and subscribed before me this 2nd day of February, A. D. 1897.

——— ———,

Cl'k Dist. Ct. of Harris County, Texas.

Copy of which is to be served herewith.

Upon consideration of the above and foregoing affidavit, it is now ordered by the court that the defendant, Thomas Tinsley, show cause before the district court of Harris county, at the court-house thereof, in the city of Houston, on the — day of February, A. D. 1897, at — o'clock in the -noon, why he should not be punished for contempt of this court in disobeying the decree of this court of April 23rd, 1896, as described in the foregoing affidavit, by failing
25 of obedience thereto in the particulars shown by such affidavit, and why he should not be committed for contempt for such disobedience, as an aid to the enforcement of the aforesaid decree until compliance by him therewith, in the particulars of disobedience by the aforesaid affidavit and payment of the costs of this proceeding, and why he should not abide by and perform such fur-

ther or *further* orders as this court may lawfully make in the premises.

Dated at Houston, Texas, this 2nd day of February, 1897.

JOHN G. TOD,
Judge 11th Judicial District of Tex.

Upon the foregoing petition being presented to me and after considering the same, I decline to issue the writ, as I do not believe that the statute upon which the applicant relies applies to a civil contempt.

Witness my hand the 17th day of March, 1897.

JOHN G. TOD,
Judge 11th Judicial District of Tex.

The foregoing petition being this day presented to me, after having examined and considered the same, I decline to issue the writ of *habeas corpus* therein prayed for.

Witness my signature, at Galveston, Texas, this 22nd day of March, 1897.

E. D. CAVIN,
Judge of the Criminal District Court of Galveston and Harris Counties, Texas.

Endorsed on back of application: 1227. 5th. Application of Thomas Tinsley for *habeas corpus*. Filed April 2d, 1897.
26 E. P. Smith, clerk.

Writ issued April 2nd, 1897, to Harris county, in obedience to order of Judge Hurt.

E. P. SMITH, *Clerk.*

To the clerk of the court of criminal appeals:

You are hereby directed to issue the writ of *habeas corpus* as prayed for by Thomas Tinsley in his application, and make same returnable at Austin, April 8th, 1897, at 10 o'clock a. m.

J. M. HURT,
Judge Ct. Criminal Appeals.

Indorsed: No. 1227. *Ex parte* Thos. Tinsley. Order to issue writ. Filed April 2nd, 1897. E. P. Smith, clerk.

The State of Texas to any constable of Harris county, Greeting:

You are hereby commanded that you serve upon Albert Erichson, sheriff of Harris county, the accompanying writ of *habeas corpus* this day issued in cause number 1227, *Ex parte* Thomas Tinsley, from Harris county, said application now on file in my office.

Herein fail not, but of this writ make due return, under the penalty prescribed by the law, with your endorsement thereon showing how you have executed the same.

Witness J. M. Hurt, presiding judge of our said court, court of criminal appeals, with the seal thereof annexed, at Austin, this 2nd day of April, A. D. 1897.

[SEAL.] E. P. SMITH, *Clerk.*

27 The State of Texas to Albert Erichson, sheriff of Harris county, Texas, greeting:

Whereas Thomas Tinsley made application to the Honorable J. M. Hurt, presiding judge of the court of criminal appeals of the State of Texas, for the writ of *habeas corpus*, alleging that he is illegally restrained of his liberty by you in said Harris county by a certain writ of commitment issued out of the civil district court of Harris county by the clerk of said court under and by virtue of a certain judgment of said court made and entered therein on the 6th day of February, A. D. 1897, in cause No. 18969, styled O. C. Drew *et al. vs.* The Houston Cemetery Company *et al.*, on the docket of said court;

Whereas the judge granted said application and ordered said writ to issue in the following words:

"To the clerk of the court of criminal appeals:

You are hereby directed to issue the writ of *habeas corpus*, as prayed for by Thomas Tinsley in his application, and make same returnable at Austin April 8th, 1897, at ten o'clock a. m.

J. M. HURT,
P. Judge Court Criminal Appeals."

You are hereby commanded to produce the body of the applicant, Thomas Tinsley, before the court in the court-room of the court of criminal appeals, at Austin, Texas, at 10 o'clock a. m., April 8th, 1897, and show why said applicant is held in custody and under restraint.

These are therefore to command you to obey the foregoing, and in all things herein fail not under the penalties prescribed by law.

28 Witness the Hon. J. M. Hurt, presiding judge of said court, this 2nd day of April, A. D. 1897.

[SEAL.] E. P. SMITH, *Clerk.*

(Original destroyed and cannot be found. Exact copy. Clerk.)
(The original afterwards found with officer's return and placed in record. E. P. Smith, clerk.)

Ex Parte THOMAS TINSLEY. No. 1227. 5th Assignment.

From Harris county.

Now comes the State, by attorney, and moves the court to dismiss the application for writ of *habeas corpus* herein and remand the relator to the custody of the sheriff of Harris county for the reason that said application fails to show, either by the recitals therein or the exhibits thereto attached, that the judgment from which the relief is sought is void; but, on the contrary, the judgment attached thereto shows upon its face an adjudication that relator had wilfully placed himself in contempt of said court and adjudicates the questions as a fact here set up to avoid said judgment against relator. If the truth of

all the facts alleged be conceded, the same are not sufficient in law to nullify the judgment rendered.

2. Said application is insufficient for the further reason that it fails to show that the relator has complied, so far as was within his power, with the orders of the court on which this commitment is based.

Respectfully submitted.

EWING & RING AND
29 MANN TRICE,
Attorneys for the State.

Endorsed: Number 1227. 5th assignment. *Ex parte* Thomas Tinsley. Application from Harris county. Motion to dismiss. Filed April 9th, 1897. E. P. Smith, clerk. Ewing & Ring and Mann Trice, assistant attorney general.

APRIL 9TH, 1897.

Ex Parte THOMAS TINSLEY. No. 1227. 5th.

Habeas corpus from Harris county.

Submitted on motion to dismiss the writ, and the same is taken under advisement, and it is further ordered that the applicant, Thomas Tinsley, be admitted to bail in the sum of twenty-five hundred dollars ($2,500.00) to abide by the further order herein pending the decision of this court.

30 THE STATE OF TEXAS, }
County of Travis. }

Know all men by these presents that we, Thomas Tinsley, as principal, and —— —— — —— ——, as sureties, are held and firmly bound unto the State of Texas in the penal sum of two thousand five hundred dollars ($2,500.00); for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and dated on this the 9th day of April, A. D. 1897.

The condition of the above obligation is such that whereas the above-bounden principal, Thomas Tinsley, being in the custody of Albert Erichson, sheriff of Harris county, Texas, charged with having committed a contempt of the district court of the 11th judicial district of the State of Texas in and for Harris county; and whereas the said Thomas Tinsley has obtained from the court of criminal appeals of the State of Texas, at Austin, a writ of *habeas corpus* to inquire into the legality of his detention by Albert Erichson, sheriff, and the said court of criminal appeals has been pleased to order that the said applicant, Thomas Tinsley, should be admitted to bail in the sum of two thousand five hundred dollars to secure his appearance before said court from day to day until the final determination hereof: Now, if the said Thomas Tinsley, principal, shall well and truly make his personal appearance before the

court of criminal appeals of the State of Texas and there remain from day to day and from term to term to abide the action of said court of criminal appeals in said *habeas corpus* proceedings, then in that event this obligation shall become void; otherwise it
31 shall remain in full force and effect.

Witness our hands this the 9th day of April, A. D. 1897.

THOMAS TINSLEY, *Principal.*
WM. P. GAINES,
N. V. DITLINGER, *Sureties.*

Approved April 9th, 1897.
R. E. WHITE,
Sheriff Travis County.

Indorsed: No. 1227. 5th assignment. *Ex parte* Thomas Tinsley. From Harris county. Appearance bond. Filed April 10th, 1897. E. P. Smith, clerk.

32 The State of Texas to any constable of Harris county, Greeting:

You are hereby commanded that you serve upon Albert Erichson, sheriff of Harris county, the accompanying writ of *habeas corpus* this day issued in case number 1227, *Ex parte* Thomas Tinsley, from Harris county, said application now on file in my office.

Herein fail not, but of this writ make due return, under the penalty prescribed by the law, with your endorsement thereon showing how you have executed the same.

Witness J. M. Hurt, presiding judge of our said court of criminal appeals, with the seal thereof annexed, at Austin, this 2nd day of April, A. D. 1897.

[SEAL.]

E. P. SMITH,
Clerk Ct. Criminal Appeals.

The State of Texas to Albert Erichson, sheriff of Harris county, Texas, Greeting:

Whereas Thomas Tinsley made application to the Honorable J. M. Hurt, presiding judge of the court of criminal appeals for the State of Texas, for the writ of *habeas corpus*, alleging that he is illegally restrained of his liberty by you in said Harris county, by a certain writ of commitment issued out of the civil district court of Harris county by the clerk of said court, under and by virtue of a certain judgment of said court made and entered therein on the 6th day of February, A. D. 1897, in cause number 18969, styled O. C. Drew *et al. vs.* The Houston Cemetery Company *et al.*, on the docket of said court;

33 Whereas the judge granted said application and ordered said writ to issue in the following words:

"To the clerk of the court of criminal appeals:

You are hereby directed to issue the writ of *habeas corpus* as

prayed for by Thos. Tinsley in his application, and make same returnable at Austin, April 8th, 1897, at 10 o'clock a. m.

J. M. HURT,
P. Judge Court Criminal Appeals."

You are hereby commanded to produce the body of the applicant, Thomas Tinsley, before the court, in the court-room of the court of criminal appeals, at Austin, Texas, at 10 o'clock a. m., April 8, 1897, and show why applicant is held in custody and under restraint.

These are therefore to command you to obey the foregoing and in all things herein fail not under the penalties prescribed by law.

Witness the Hon. J. M. Hurt, presiding judge of said court, this 2nd day of April, A. D. 1897.

[SEAL.] E. P. SMITH, *Clerk.*

In the Court of Criminal Appeals for the State of Texas, at Austin.

In re THOMAS TINSLEY, Petitioner for Writ of *Habeas Corpus*, *against* ALBERT ERICHSON, Sheriff of Harris County.

The Respondent's Return.

34 To the honorable the judges of the court of criminal appeals of Texas:

Albert Erichson, as sheriff of the county of Harris, the defendant in the writ of *habeas corpus* issued herein on April 2nd, 1897, on the petition of Thomas Tinsley, copy of which writ served upon respondent herein is attached to and connected herewith, for return thereto, respectfully shows to your honors that true it is that the said Thomas Tinsley therein named is confined and restrained of his liberty by this respondent, Albert Erichson, as sheriff aforesaid, but this respondent alleges that the said Thomas Tinsley is so restrained lawfully by virtue of a warrant or writ of commitment issued out of the district court of the county of Harris against him, pursuant to an order thereof, convicting him of contempt of the said court, at the information by affidavit of William Christain, receiver, etc., in a certain cause depending therein, number 18969 on the docket of said court, entitled Octavius C. Drew *et al. v.* The Houston Cemetery Company *et al.*, for the wilfull disobedience of a certain order rendered by said court therein, to wit, April 23rd, 1896, such order of conviction and warrant of commitment bearing date the 6th day of February, A. D. 1897, the tenor of which warrant or writ of commitment is shown by the original and exhibits thereof, including a certified copy of said order of conviction and of said previous order for disobedience of which said contemnor stands committed; which warrant or writ and the exhibits thereof are hereunto annexed, made a part hereof, and prayed to be taken and read in connection herewith as though here set out at length and verbatim.

And this respondent, as a part of his return, attaches hereto duly

certified copies, under the hand of the clerk and seal of
35 the said district court, of the affidavit by said William Christain, as receiver aforesaid, for a rule upon said Thomas Tinsley to show cause against a commitment for contempt, and of the rule entered by said court against him to show cause, and of his acceptance of service thereof, and of his answer thereto, and of the replication to said answer, and he prays that the same may be taken and read as a part hereof as though here set out at length and verbatim, which proceedings aforesaid are the true cause of the imprisonment of him, the said Thomas Tinsley, he having failed and refused and still failing and refusing to comply with or obey the requirements of the aforesaid order of commitment, as well as said warrant or writ of commitment issued thereon.

Wherefore this respondent, Albert Erichson, as sheriff aforesaid, has here before your honors the body of the said Thomas Tinsley, together with the said writ or warrant of authority, by virtue of which respondent holds him in custody, as by the attached copy of writ of *habeas corpus* he is commanded, and, as in duty bound, he submits to your honors the proper disposition of the said applicant, Thomas Tinsley, as to law shall appertain, standing ready to perform and abide by such lawful order or orders as your honors may make in the premises.

ALBERT ERICHSON,
Sheriff of Harris County, Texas.

Thursday, April 8th, A. D. 1897.

THURSDAY, *April 23rd*, 1896.

O. C. DREW *et al.*
vs. } No. 18969.
36 THE HOUSTON CEMETERY COMPANY.

This 23rd day of April, A. D. 1895, after reasonable notice to and appearance by the defendants and after hearing the arguments of the attorneys for the respective parties, upon reading and considering the verified *position* in this cause, together with all the evidence, to wit, the counter-affidavit of T. R. Franklin, attached to the petition, and of W. D. Cleveland, W. S. Wall, and Chas. E. Syfan, adduced in support thereof, and also the sworn answers of the defendants, together with all their evidence, to wit, the counter-affidavits of Thomas Tinsley and F. P. Noland, adduced in support thereof, and on motion of the counsel for the plaintiffs, because it is the opinion of the court that there is a reasonable probability of plaintiffs obtaining relief at the final hearing, and that the property, the subject of the suit, is in immediate danger, making it necessary for the court to take the same into its custody in order to its preservation, it is ordered by the court that William Christain be, and he is hereby, appointed receiver of this court of all and singular the property, assets, rights, and franchises of the defendant, The Houston Cemetery Company, of every description, including all money, claims in actions, credits, bonds, stocks, leas-hold interest or operating contracts, and other assets of every kind, and all other

property—real, personal, or mixed—held or possessed by said company, and also of the trust fund described in the plaintiffs' petition as purporting to be loaned to said company and secured by a mortgage deed of trust, together with the accretions thereto since accruing or to accrue; to have and to hold the same as an officer of
37 and under the orders — directions of this court. The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, upon taking the oath and executing a bond with three or more good and sufficient sureties, to be approved by this court, in the terms and conditioned as required by law, in the sum of five thousand ($5,000.00) dollars. Said receiver is hereby invested with all the powers usual or incidental to his office, and he is hereby specially authorized and directed to carry on and continue the business of said defendant, The Houston Cemetery Company, and to take all such steps, perform all such acts, and make all such expenditures and incur all such liabilities as may be reasonably necessary to maintain said company's cemetery property in a reasonable state of preservation for the uses and purposes of a cemetery, including the repair or construction of such bridge or bridges as may be necessary to that end, and also the obtaining of such supply of water at reasonable cost as may be necessary to prevent the waste, decay, or destruction of such cemetery property or any part thereof, and to protect the franchises of said corporation from forfeiture from acts of non-user or misuser. The said receiver is also specially authorized and directed to collect by suit or otherwise and to preserve and to invest said trust fund in accordance with the trusts thereof, but no investment to be made without confirmation of the court. The said receiver is also specially authorized and directed to make such sales for cemetery purposes of the unsold lots in said cemetery as may become necessary from time to time, subject to such reasonable rules and regulations as may be agreed upon
38 or determined by the court. Each and every of the officers, directors, agents, and employés of the said Houston Cemetery Company are hereby required and commanded forthwith, upon the demand of the said receiver, to turn over and deliver to said receiver any books, papers, moneys, or deeds or property or vouchers for the property under their control *under their control* to which such corporation is entitled or which they hold or control as such officers, directors, agents, or employés. Said receiver is hereby fully authorized to institute and prosecute all such suits as he may deem necessary, and to defend all such actions instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any suits against the said Houston Cemetery Company; and the court reserves all questions concerning the issuance of preliminary injunctions in this behalf without prejudice to plaintiff, and also reserves the right by orders hereinafter to be made to in all respects regulate and control the conduct of said receiver. The defendants each and all except to the foregoing decree and order, and in open court give notice of appeal to the court of civil appeals of the first supreme district.

O. C. DREW
vs.
THE HOUSTON CEMETERY COMPANY. } No. 18969.

This undertaking, made and entered into the 23rd day of April, A. D. 1896, witnesseth, that we, William Christain, as principal, and J. H. B. House and E. P. Hill, as sureties, do promise and undertake to and with the clerk of said court, J. R. Waties, and
39 his successors in office, for the benefit of whom it may concern, in the final sum of five thousand ($5,000.00) dollars, that the said William Christain will faithfully discharge all the duties of receiver of the said The Houston Cemetery Company in the above numbered and entitled action, and obey the orders of the court therein.

WM. CHRISTAIN.
J. H. B. HOUSE.
E. P. HILL.

Approved this 23rd day of April, A. D. 1896.

S. H. BRASHEAR,
Judge 11th Judicial District of Texas.

I do solemnly swear that I will faithfully perform the duties of receiver in the above numbered and entitled action.

WM. CHRISTAIN.

Sworn to and subscribed before me this 23rd day of April, A. D. 1896. S. H. BRASHEAR, *Judge.*

Wm. Christain having presented his bond and taken the required oath, said bond is now approved, and his appointment is made absolute.

S. H. BRA*HS*EAR, *Judge.*

THE STATE OF TEXAS, }
County of Harris. }

O. C. DREW *et al.*
vs.
THE HOUSTON CEMETERY CO. } No. 18969.

I, J. R. Waties, clerk of the district court of Harris county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the court appointing William Christain receiver, his bond, and confirmation in the above numb-red
40 and entitled cause as the same appears of record in Minute Book No. 5, on page- 124, 125, and 126, in my office.

Given under my hand and the seal of said court, at office, in Houston, Texas, this the 2nd day of June, A. D. 1896.

J. R. WATIES,
Clerk District Court, Harris County, Texas,
[L. S.] By G. H. EVANS, *Deputy.*

At a regular term of the district court in and for Harris county, Texas, held at the court-house thereof, in the city of Houston, this 6th day of February, A. D. 1897.

Present: Hon. John G. Tod, district judge presiding.

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

In the matter of William Christain, as receiver herein, informant against Thomas Tinsley, respondent, for contempt, etc.

This 6th day of February, A. D. 1897, came on to be heard in open court the proceedings for contempt of this the district court of Harris county, Texas, against the respondent Thomas Tinsley, upon the affidavit of said William Christain, as receiver, for a rule to show cause, etc., and the court's rule to show cause thereon, both of February 2nd, 1897, and the answer of said respondent to such rule and the replication of said informant to such answer,
41 both this day filed herein, said respondent meantime having had due and reasonable notice in this behalf and appeared in person and by attorney and announced ready for the hearing; and the court having heard such affidavit, rule to show cause, answer, and replication, and the evidence adduced, both oral and written, in support of the issues so tender- and joined, as well as the argument of counsel, doth find and declare that the facts set forth in said affidavit and the special plea of said replication are true as concerns the minute book, notes, and trust fund of four hundred ninety-two dollars and fifty-two cents, as hereinafter specified, and that said respondent, under the evidence adduced, has failed to show cause, as required, by the answer aforesaid good or sufficient in law.

Therefore it is considered by the court, ordered, and adjudged that the said respondent, Thomas Tinsley, is guilty of a contempt of this court in having wilfully disobeyed this court's order made and rendered in the above numbered and entitled cause on, to wit, the 23rd day of April, A. D. 1896, appointing William Christain receiver of the property of every description of the Houston Cemetery Company, etc., etc., by failing and refusing to turn over and deliver to said William Christain, as such receiver, after he had taken the oath and given the bond, which was approved, and duly qualified as such receiver, as required by said order, notwithstanding due and personal demand made therefor upon him, Thomas Tinsley, by said William Christain, receiver as aforesaid, and though having it then and now within his power and ability to comply, the following-described property of and belonging to said Houston
42 Cemetery Company covered by such order, to which it was entitled, the same being then and still held and controlled by him, Thomas Tinsley, as an officer of said Houston Cemetery Company, to wit: 1st, the notes belonging to said Houston Cemetery Company as its bills receivable then and there on hand and covered by and embraced in said order of April 23rd, 1896, amounting to the sum of fourteen hundred and forty dollars and fifty cents, as shown by the schedule marked Exhibit "A" attached to the aforesaid affidavit, which schedule the clerk is directed to record on the minutes in connection herewith and to be taken as a part hereof; 2nd, that certain book belonging to said Houston Cemetery Com-

pany and known as its "minute book," then and there on hand and covered by and embraced in said order of April 23rd, 1896; 3rd, the portion of the trust fund to which said Houston Cemetery Company was entitled under its charter and by-laws which accrued for and during the years A. D. 1894 and A. D. 1895, covered by and embraced in said order of April 23rd, 1896, amounting to the sum of four hundred ninety-two dollars and fifty-two cents.

And the court doth further consider and adjudge, order and direct that the said contemnor, Thomas Tinsley, pay to the sheriff of Harris county, Texas, a fine of one hundred dollars as a punishment for the contempt aforesaid, and that he forthwith turn over and deliver to said William Christain, as receiver aforesaid, the said notes, minute book, and trust fund of four hundred ninety-two dollars and fifty-two cents as an aid to the enforcement of the aforesaid order of April 23rd, 1896, and that in default of immediate payment of said fine and of the delivery and turning over forthwith to said William Christain, as receiver aforesaid, of said notes, minute
43 book, and trust fund of four hundred ninety-two dollars and fifty-two cents, he, the said contemnor, Thomas Tinsley, be imprisoned in the common jail of Harris county, Texas, until he shall pay the said fine of one hundred dollars, as herein directed, and until he shall turn over and deliver to the said William Christain, as aforesaid, the said sheriff affording him, said Thomas Tinsley, a reasonable opportunity to do so, if he shall so desire, the said notes, minute book, and trust fund of four hundred ninety-two dollars and fifty-two cents, and until he shall pay to the sheriff aforesaid his cost for executing the commitment hereunder, or until he shall be discharged by the further order of this court, and that, to carry this judgment into effect, the clerk of this court do forthwith, under his hand and the seal of this court, issue a commitment in terms of the law, reciting generally the proceedings herein, and to which there shall be attached as Exhibit A thereof a certified copy of the aforesaid order of April 23, 1896, under the seal of this court, and to which there shall also be attached as Exhibit B thereof the schedule of the aforesaid notes annexed to the aforesaid affidavit, or a copy of such schedule, and the clerk of this court shall also, in addition to the warrant of commitment, deliver to said sheriff a certified copy of this *this* judgment, to be held by him as further evidence of his authority for the commitment hereby directed.

By the court:

(Signed) JOHN G. TOD,
Judge 11th Judicial District of Texas.

I certify the above and foregoing, with the accompanying schedule, to be a true and correct copy of the original as the same
44 appears on the minutes of the said district court of Harris county, Texas, as witness my hand and the seal of said court at my office in the city of Houston, Texas.

J. B. WILLIAMS,
Clerk District Court, Harris County, Texas,
[SEAL.] By C. L. VINSON, *Deputy.*

Copy.

Statement of Bills Receivable Account.

Notes due the Houston Cemetery Company up to March 31st, 1896.

1892.	Notes due prior to 1892:	Jas. Snowball...	35		
		T. L. Lubbock..	7 50		
		W. T. Walker...	63 00		
		F. A. Kirluck...	20 00		
		Tankersy.....	22 50		
					147 50
1892.					
Aug.	29.	A. Kramer.....	100 00		
Aug.	7.	S. M. Williams.....	90 00		
Sept.	28.	I. A. Sternberg.....	190 00		
Oct.	3.	W. H. Gill, balance...	3 00		
	7.	Mary A. Dirky.....	50 00		
Nov.	23.	Ed. L. Pingrey, balance	4 00		
Dec.	—.	Mary Bastian.....	50 00		
1893.					
Feb'y	—.	W. B. Ransom	20 00		
May	—.	E. Garloff...	100 00		
July	—.	Wm. Harrell...	150 00		
Nov.	—.	Dr. Rayford.....	57 50		
1894.					
Jan.	—.	Mrs. A. Wilson.	15 00		
Apr-l	—.	Henderson..	10 00		
July	—.	Fuqua & Perkins..... ...	20 00		
45					
——	—.	Mrs. H. T. Carr.....	90 00		
Ap'l	—.	Geo. H. Breaker.....	40 00		
Oct.	—.	Wm. N. Brown	30 00		
1895.					
Jan.	15.	Susan Hurley.....	55 00		
May	—.	Isaac Oliver.....	75 00		
June	—.	W. C. Wilcox	110 00		
Aug.	—.	Sam. Bagino.....	10 00		
Oct.	—.	W. R. Sinclair..	55 00		
1896.					
Feb.	—.	A. F. Parker.....	30 00		
Jan.	—.	A. J. Keisling.....	22 50		
					1,277 00
					$1,424 50
April 2/92.		W. A. Polk, 90 days.....	20 00		
Sept. 3/95.		F. A. Pope..	40 00		
					60 00
					$1,484 50

In the District Court of Harris County, Texas.

OCTAVIUS C. DREW *et al.*
v.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

The State of Texas to the sheriff or any constable of Harris county, Texas:

Whereas the district court of Harris county, at a regular term thereof, in the above numb-red and entitled cause, made and rendered its certain order bearing date April 23rd, A. D. 1896, appointing William Christain, duly qualified to act, — of all and singular the property of every nature belonging to the Houston Cemetery Company, one of the defendants in said cause, and directing that the officers and directors of said company, including Thomas
46 Tinsley, one of the defendants therein, who had appeared before said court before said order was entered to deliver over to said receiver all and singular said property, a copy of which order, duly certified, accompanies this writ and is attached hereto, marked Exhibit A; and whereas said William Christain, as receiver, filed herein, February 2nd, 1897, his affidavit for a rule to show cause against said Thomas Tinsley for disobedience of said order after personal demand on him by said receiver in failing to turn over and deliver to him, as required by the said order, the following property belonging to the Houston Cemetery Company, to wit:

1st. The notes belonging to said company as its bills receivable and covered by said order, amounting to fourteen hundred and forty $\frac{50}{100}$ dollars, as shown by schedule hereto attached, marked Exhibit "B," and made a part hereof.

2nd. That certain book belong- to the said Houston Cemetery Company known as its minute book and covered by said order.

3rd. The sum of four hundred ni-ety-two $\frac{52}{100}$ dollars, being the portion of the trust fund to which said cemetery company was entitled under its charter and by-laws and covered by said order, and which amount for and during the years 1894 and 1895 being shown by the books of said company; and whereas the said district court, on, to wit, February 2nd, 1897, after the filing of said affidavit, entered its rule against said Thomas Tinsley to show cause why he should not be held and punished as for contempt of said court for his disobedience of the aforesaid order of April 23rd, 1896, in the particulars hereinbefore recited; and whereas due and rea-
47 sonable notice was given to him, said Thomas Tinsley, to appear and show cause in that behalf and due and proper service had for the purpose, he, the said Thomas Tinsley, to wit, February 6th, 1897, appeared before said court in person and by attorney, and the court, having heard the pleadings and answers and evidence, with the argument of counsel in that behalf addressed and presented, did order and adjudge that the said Thomas Tinsley was guilty of a contempt of the said court in having wilfully disobeyed the order hereto annexed, dated April 23rd, 1896, by failing to turn over and deliver to the said William Christain, as receiver

aforesaid, the hereinbefore-mentioned property and moneys belonging to said cemetery company after due and personal demand therefor, he, the said Thomas Tinsley, having it then and there and now within his ability and power to comply.

And whereas the said court did, by the said order, so adjudge him, the said Thomas Tinsley, guilty of contempt aforesaid, order and direct that the said Thomas Tinsley pay to the sheriff of Harris county, Texas, a fine of one hundred dollars as punishment for the contempt aforesaid, and that he turn over and deliver to William Christain, as receiver aforesaid, the aforesaid minute book, notes, and the trust fund aforesaid, amounting to four hundred ni-ety-two $\frac{52}{100}$ dollars ($492.52), and that in default of immediate payment of fine and of delivery and payment of said minute book, notes, and money directed, as aforesaid, to be paid and turned over to said receiver he be committed to the common jail of Harris county, Texas, and imprisoned therein until full compliance with the said order or until the further order of said court, and that a commitment issue to carry this judgment into effect:

48 Now, therefore, we command you to take the body of him, the said Thomas Tinsley, if he is to be found in your county, and commit him to the common jail of Harris county, Texas, and to securely keep and detain him therein under your custody until he shall pay the aforesaid fine of one hundred dollars, as aforesaid, and until he shall turn over and deliver unto the said William Christain, as receiver aforesaid, you giving him opportunity, if he *so* desires so to do, the aforesaid minute book, notes, and trust fund of four hundred ninety-two $\frac{52}{100}$ dollars and shall have paid the costs of executing this writ, or until the further order of this court.

Herein fail not under the penalty of the law and make due return hereof showing how you have executed the same.

Issued this February 6th, 1897. Witness J. B. Williams, clerk of the district court of Harris county, Texas, and the seal thereof, at office in the city of Houston, this 6th day of February, 1897.

(Signed) J. B. WILLIAMS,
Clerk District Court, Harris County, Texas,
By C. L. VINSON.

Agreed that this is true copy of the original commitment, original being in hands of sheriff.

EWING & RING,
FISET & MILLER,
Attorneys for Parties.

OCTAVIUS C. DREW *et al.* *vs.* HOUSTON CEMETERY COMPANY *et al.* } No. 18969. Suit Pending in the District Court of Harris County, Texas.

To the district court of Harris county:

Informing, William Christain, in his capacity as receiver for the Houston Cemetery Company under appointment of this the district

court of Harris county, Texas, in the above numbered and
49 entitled cause depending therein, complaining by this his affidavit against Thomas Tinsley, late of the county of Harris, in the State of Texas, and now sojourning therein, for contempt of the said court in the matters hereinafter specified—

Doth present and show unto the said court as follows, to wit:

That in a certain suit commenced and pending in this the district court of Harris county, Texas, numbered 18969 on the docket thereof, wherein William V. R. Watson, Octavius C. Drew, and Thomas W. House, as intervenors, are plaintiffs, and The Houston Cemetery Company, Thomas Tinsley, Alfred Wisby, Charles Tinsley, A. L. Brown, W. T. Watt, and W. M. Sleeper are defendants, in which the amount in controversy was more than five hundred dollars, exclusive of interest and costs, the said district court, Honorable Sam. H. Brashear, the regular district judge thereof, presiding, afterwards, on, to wit, the 23rd day of April, A. D. 1896, made and rendered an interlocutory decree therein, after due and reasonable notice to and appearance and contest by said defendants and each of them, by the terms and provisions of which decree William Christain, then and there a *bona fide* citizen of the State of Texas and qualified to vote therein, and who has ever since then so been and kept and maintained his actual residence within the said State of Texas, was appointed receiver by said court of all and singular the property and property rights and franchises of and belonging to the said defendant, Houston Cemetery Company, then and there a corporation duly created and existing under and by virtue of the laws of the State of Texas, with all such property then and there situated within the said State of Texas; and by the said de-
50 cree the said receiver, as such, upon duly qualifying in that capacity, was then and there directed to take into his official custody and possession, as such receiver, all and singular the property of every nature and description belonging to the said Houston Cemetery Company in its own right, and also that certain fund set aside by the charter and by-laws of said company as a perpetual and inviolate trust, being then and there ten per — of the proceeds derived from the sales of cemetery lots owned by the said company and to which the said company was entitled in trust; and by the terms and provisions of said decree, so made *made* and rendered as aforesaid, each and every of the officers, directors, agents, and employés of the said company, including the said Thomas Tinsley, who was then and there and had been for several years theretofore the president of the said company, were, and each of them was, required and commanded forthwith, upon the demand of said receiver, to turn over and deliver to him, the said receiver, in his capacity as such, any books, papers, moneys, deeds, or other property or vouchers for such property under the control of them or any of them to which said company was entitled or which they held or control-ed as such officers or directors, agents or employés; to which said decree upon the record of the proceedings of the said court herein reference is now made for verification, such terms and provisions being therein manifest.

That, pursuant to and in virtue of the appointment so made as aforesaid, he, the said William Christain, immediately upon the rendition thereof and long prior to the happening of the matters and things hereinafter specified, before entering upon his duties as such receiver aforesaid was duly sworn to perform them
51 faithfully, and did then and there execute a bond as such receiver, with three good and sufficient sureties, which was then and there approved by the said court — appointed him, in the sum fixed by the said court, conditioned that he would faithfully discharge all the duties of receiver in the said action (which was named) and obey the orders of the court therein, and he, William Christain, ever since the taking of said oath and giving of said bond has been and is now the duly qualified and acting receiver in this behalf under the appointment aforesaid.

That he, the said Thomas Tinsley, was when the aforesaid decree was made and rendered, and when the said receiver qualified as such, and when this court acquired jurisdiction over the property, property rights, and franchises aforesaid, and had been during several years before then, in the custody, control, and management, with the dominating direction and supervision, of all such property, property rights, and franchises, and then and there having it within his control, power, and ability to comply in every respect with the terms and provisions of the above decree and as to the particulars and matters of the property hereinafter mentioned.

That when the aforesaid decree was made and rendered, and when said receiver qualified as such, and when this court acquired jurisdiction over the property, property right- *rights*, and franchises aforesaid, the said defendant, Houston Cemetery Company, was entitled to the following-described moneys, notes, books, and funds, which then and there belonged to it, to wit:

1st. The moneys belonging to said corporation then and there on hand and covered by and embraced in said decree, amounting to the sum of three thousand one hundred and four dollars and
52 fifty cents, as shown by the books of the said company.

2nd. The notes belonging to said corporation as its bills receivable then and there on hand and covered by and embraced in said order, amounting to the sum of fourteen hundred forty dollars and fifty cents, as shown by the books of said company and the attached schedule marked Exhibit "A."

3rd. That certain book belonging to said corporation and known as its "minute book," then and there on hand and covered by and embraced in said decree, and also that certain book belonging to said corporation and known as its "bank deposit book" then and there on hand and covered by and embraced — said decree.

4th. The portion of said trust fund to which said corporation was entitled and which is covered by the note of said corporation, amounting to the sum of eight thousand two hundred and eighty-five dollars and fifty-one cents, and also that portion of said trust fund which accrued for and during the years A. D. 1894 and A. D. 1895, amounting to the sum of four hundred ninety-two dollars and fifty-two cents, as shown by the books of said company to have

so accrued, and also the sum of six hundred and ninety-five dollars, which arose from the assessments in perpetuity, belonging to said trust fund, but not placed to its credit, as shown by the books of said company.

That heretofore, before the filing or presentment hereof, he, the said William Christain, as receiver aforesaid, made demand in the city of Houston, State of Texas, of him, the said Thomas Tinsley, who then and there had it within his power to comply in
53 obedience to the aforesaid decree, in writing, that he, said Thomas Tinsley, turn over and deliver to him, said William Christain, as receiver aforesaid, as required to do by the aforesaid decree, the moneys, notes, books, and funds hereinbefore specified, which demand was unequivocal, particularly specified the subjects thereof, and was accompanied with a duly certified copy of the aforesaid decree, under the seal of said court, which copy was the- and there delivered into the hands of him, the said Thomas Tinsley.

That notwithstanding the decree and demand aforesaid he, the said Thomas Tinsley, then and there refused compliance therewith, then and there failing to so comply, though having had a reasonable opportunity to do so in wilfull and contemptuous disobedience of the aforesaid decree.

That by the acts and conduct of him, the said Thomas Tinsley, in failing to obey the said decree in manner and form, as aforesaid, the administration of justice in this behalf has been and will continued to be until obedience thereof by him is enforced greatly embarrassed and impeded, and he, the said William Christain, as receiver aforesaid, prevented or impeded in the discharge of his official duty as such receiver, to the detriment and harm of the interest committed to his custody in that behalf.

That when the aforesaid decree was made and rendered he, the said Thomas Tinsley, was not only a party to the aforesaid suit, but was actually a party before the court in said cause, then and there represented and present in person and by attorney and then and there, through his said attorney, contesting the appointment of the said receiver.

That the aforesaid decree is in full force and effect, not re-
54 versed, vacated, or otherwise set aside, and the said cause is still pending in this court, and the aforesaid receiver still acting as such herein under the aforesaid appointment, and in the said cause no final decree has yet been entered, made, or rendered.

Wherefore William Christain, in his capacity as receiver aforesaid, informant and affiant herein, moves the court for a rule against him, the said Thomas Tinsley, to be and appear before this honorable court in the city of Houston, at the court-house thereof, at a time to be fixed by the court, to show cause, if he can, why he should not be punished for his misconduct in disobeying the aforesaid order in the particulars hereinbefore shown as for a contempt of this court, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by — with the aforesaid decree in the particulars of disobedience and payment of costs of this proceedings,

and why he should not abide by and perform such other or further orders as the court may lawfully make in the premises.

And will ever pray, etc.

WILLIAM CHRISTAIN, *Receiver.*

Sworn to and subscribed before me this the 2nd day of February, A. D. 1897.

J. B. WILLIAMS,
Clerk of the District Court of Harris County, Texas,
[SEAL.] By C. S. VINSON, *Deputy.*

Upon consideration of the above and foregoing affidavit, copy of which is to be served herewith, it is now ordered by the court that the defendant Thomas Tinsley show cause before the district court of Harris county, at the court-house thereof, in the city of
55 Houston, on the 6th day of February, A. D. 1897, at ten o'clock in the forenoon, why he should not be punished for contempt of this court in disobeying the decree of this court of April 23rd, 1896, as described in the foregoing affidavit, by failing of obedience thereto in the particulars s-own by such affidavit, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by him therewith in the particulars of disobedience by the aforesaid affidavit and payment of the cost of this proceeding, and why he should not abide by and perform such *further* or further orders as this court may lawfully make in the premises.

Dated at Houston, Texas, this the 2nd day of February, 1897.

JOHN G. TOD,
Judge of the 11th Judicial District of Texas.

"EXHIBIT A."

Statement of Bill Receivable Account.

Notes due the Houston Cemetery Company to March 31st, 1896.

1892.	Note due prior to 1892:	Jas. Snowball...	35 00	
		T. S. Lubbock...	7 50	
		W. T. Walker...	63 00	
		J. A. Kerlicks...	20 00	
		Tankersley	22 50	
				147 00
1892.				
Aug.	7.	S. M. Williams.....	90 00	
Aug.	29.	A. Kramer.....	100 00	
Sept.	28.	A. J. Sternenberg....	90 00	
Oct.	3.	W. H. Gill, balance.....	3 00	
Oct.	7.	Mary A. Dicky.....	50 00	
56				
Nov.	23.	Ed. L. Tingrey.....	4 00	
Dec.	—.	Mary Bastian.....	50 00	

1893.				
Feb.	—.	W. B. Ransom	20 00	
May	—.	Emma Garlock	100 00	
July	—.	Wm. Harrell	150 00	
Nov.	—.	Dr. Rayford	57 50	
1894.				
Jan.	—.	Mrs. A. Wilson	15 00	
April	—.	Henderson	10 00	
July	—.	Fugua & Perkins	20 00	
——	—.	Mrs. H. T. Carr	90 00	
April	—.	Geo. H. Breaker	40 00	
Oct.	—.	Wm. N. Brown	30 00	
1895.				
Jan.	15.	Susan Hurley	55 00	
May	—.	Isaac Oliver	75 00	
June	—.	A. C. Wilcox	110 00	
Aug.	—.	Sam. Bagino	10 00	
Oct.	—.	W. R. Sinclair	55 00	
1896.				
Feb.	—.	A. F. Parker	30 00	
Jan.	—.	A. J. Keisling	22 50	
				1,277 00
				1,424 50
Ap'l	2/92.	W. A. Polk, 90 days	20 00	
Sept.	3/95.	W. F. Pope	40 00	
				60 00
				1,484 50

Copy of the within affidavit and rule to show cause received, service accepted, and further or other notice or copy waived this the 2nd day of February, A. D. 1897, after filing of such affidavit.
THOMAS TINSLEY.

57 In the District Court, Harris County, Texas, February Term, 1897.

O. C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

Now comes Thomas Tinsley, and in answer to the rule entered herein that he show cause why he should not be punished for contempt, etc., respectfully represents that Alfred Wisby was secretary and treasurer of said company when the receiver was appointed, and had been for several years, and had custody and control of the books and funds of said company; that said Wisby collected all the moneys due the company and kept the books and accounts, and respondent did not know what moneys were paid to said company or what funds should be on hand except from the statement of

said Wisby and from an examination of his books; that said respondent ascertained about February 1st, 1896, that said Wisby had converted the funds of said company to his own use and was short in his accounts, and, as near as respondent could ascertain, the shortage amounted to twelve hundred and fifty dollars; that respondent thereupon demanded a settlement of said shortage, but said Wisby was unable to make same good in cash, but promised soon to do so, and to give him an opportunity to pay same, and further because it was the best settlement that could be made under the circumstances, it was agreed that he should be credited on the books of said company with said twelve hundred and fifty dollars as a consideration of two pieces of real estate in Houston owned by him, and he should convey said real estate to said company, which was done, not as an absolute conveyance, but to give said Wisby an opportunity to pay said amount; that
58 by reason of said transaction, as no money was paid by said Wisby, there was a shortage in the company's funds of $1,250.00; that since the receiver took charge other misappropriations by said Wisby of the company's funds have been discovered, as respondent has been informed and believes, the respondent asks that the testimony of said Wisby, filed herein with the report of the special master, be considered in passing on the question of contempt; that respondent has not now and has not had since the appointment of the receiver any moneys of said company, and if the books show $3,104.50 was on hand when the receiver was appointed, said money was appropriated by some other person than respondent.

Respondent further says that he has not had the "bank deposit book," but he is informed and believes said book is now and ever since said appointment has been in the Houston National Bank of Houston, Texas, and same can be had by the receiver asking for it at said bank.

Respondent further says that he has never had any of the $695.00 of assessments in perpetuity belonging to the trust fund of said company, and that the note of the company for $8,285.51 to Tinsley or trustee of trust fund was given in 1893, and in this connection respondent prays that the sworn answer of the defendant and of respondent, filed herein April 14th, 1896, be considered on explaining said note.

Respondent further says, in answer to the charge that he has in his possession and has refused to turn over to the receiver the notes of the company, its minute book, and $492.52 of its trust fund, that said Wisby, who had said trust fund, misappropriated same and converted it to his own use, and that April 15th, 1896, respondent, as trustee of said fund, demanded same and Wisby
59 was unable to pay it to respondent; that thereupon the respondent, as trustee, gave said company his receipt for said money, and thereby assumed liability to pay same, and said company also became liable to him in that amount; that at same time and on consideration of respondent assuming said liability said note of said company for $1,500.00, hereinbelow mentioned, *were* given

to said Thomas Tinsley; that in January, 1896, the books of the company showed a considerable amount of money on hand belonging to said company, and a dividend was duly and repeatedly declared, and, after the other stockholders received their dividend, respondent demanded of said Wisby his dividend; that said Wisby, as respondent then, about February 1st, 1896, first ascertained, had misappropriated the company's funds and did not have on hand the money to pay respondent's dividends by $500.00, and thereupon, about February 1st, 1896, respondent took said company's due bill for $500.00, and said company owned him that amount; that when this suit was filed against said company there *was* no funds on hand with which to employ counsel and pay the expenses of the litigation, while it was necessary to incur such expenses; that respondent, from time to time, as it was necessary, from the filing of the suit till after the receiver was appointed, advanced said company for attorneys' fees and such expenses about $1,000.00, and had he not done so said company could not have defended this suit; that on or about April 15th, 1896, at a meeting of the board of directors of said company, at which a quorum was present, a resolution was passed authorizing the execution of the company's note to *to* the order of Chas. Tinsley, who endorsed it over to said Thomas Tinsley, for $1,500.00, to cover said indebtedness of $500.00 for a dividend not paid; $492.52, trust fund not received by said Tinsley, for which he was conditionally liable, as aforesaid, and balance of $1,500.00 for attorneys' fees which the- had been advanced, and further authorized the- to deliver to said Tinsley, as collateral security, *of* said minute book and $1,342½ of the company's notes, and said $1,500.00 note is exhibited herewith on evidence; that by reason thereof said Tinsley was and is entitled to said collateral security till said note is paid, and, if he is not so entitled, he has always believed and now believes he is so entitled, and he has held said collateral in the honest belief that in law he is so entitled to hold it till said note is paid; that said receiver refused, when asked by said Tinsley, to pay said $1,500.00 note, and contended that same was not a binding obligation of the company.

60

Respondent further says that April 26th, 1896, he invested said $492.52 of trust fund in vendor's lien notes, as appears on back of said $1,500.00 note, and he had to pay $7.70 of his own money to make said investment, and he offered to said receiver said notes upon payment to him of $7.70, and said receiver refused to accept same upon that condition; that respondent is entitled to receive said $7.70 upon turning over said note, and he is now willing and has always been willing to turn over same upon such payment.

Respondent says he has no other notes of said company, except those given as collateral, and he has no property of said company except said minute book, and he is willing, and always has been willing, to turn same over to receiver upon payment of the note for which they are collateral, and he honestly believes he is entitled to same till said note is paid.

61

Respondent says that he has acted in good faith in this matter and has not intended any contempt of the court or

disobedience of the order, and he does not believe he has been guilty of same; that if he has erred it has been a mistake as to his legal rights, which he has sought to guard and protect.

Wherefore he respectfully asks that this said rule *nisi* be set aside and he be discharged with his costs.

THOMAS TINSLEY.

Personally appeared before me Thomas Tinsley, who, being duly sworn, says the foregoing answer is true so far as it purports to set *forth*, and he believes it to be true so far as it purports to be upon information and belief.

Sworn to and subscribed before me this February 6th, 1897.

JOHN B. WILLIAMS,
Clerk D. C., H. County.
S. LYLE, *Deputy.*

In the District Court of Harris County, Texas.

OCTAVIUS C. DREW *et al.*
vs.
HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

And now comes William Christain, as receiver in this behalf, and excepts to the answer of the respondent Thomas Tinsley, filed herein February 6th, 1897, to the rule of the court of February 2nd, 1897, to show cause against punishment for contempt, and says the same is insufficient in law to show cause as required, and of this he prays judgment, etc.

And this repliant, not waiving but insisting on said exception, further replying, if required, doth traverse each and every allegation in said answer, and says the same are not true in manner, form, or substance, as therein averred, and of this he prays inquiry, etc.

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And, further specially replying, this repliant says that this court had acquired jurisdiction of the entire property of said Houston Cemetery Company before the pretended deposit of the notes and books as collateral, as set forth in said answer, and the same was void and of no effect as against the court's order herein for contempt, for which said respondent stands herein ruled, and this he is ready to verify, etc.

WILLIAM CHRISTAIN, *Receiver.*

STATE OF TEXAS, }
Harris County. }

I, John B. Williams, clerk of the district court in and for Harris county, hereby certify that the above and foregoing is a true and correct copy of the original affidavit for a rule to show cause, the order to show cause, the acceptance of service thereof, the answer thereto, and the replication to such answer, in the matter of Wm. Christain, as receiver, informant, against Thomas Tinsley, respondent, for contempt, etc., in cause number 18969, entitled Octavius C

Drew *et al. vs.* The Houston Cemetery Company *et al.*, pending in said court, as the above appears of record in the minutes of said court and on file in my office.

J. B. WILLIAMS,
Clerk of the District Court of Harris Co., Tex.,
[SEAL.] By E. H. DUMBLE, *Deputy.*

Endorsed: No. 1227. *Ex parte* Thomas Tinsley, applicant for writ of *habeas corpus.* Return of respondent Albert Erichson as sheriff of Harris county. Filed April 8th, 1897. E. P. Smith, clerk.

63 In the Court of Criminal Appeals of the State of Texas, at Austin.

In re THOMAS TINSLEY, Petitioner for Writ of *Habeas Corpus.*

Argument for Respondent.

The district court of Harris county, in a suit to which The Houston Cemetery Company, a corporation for purposes of sepulture; Thomas Tinsley, and others were parties as defendants, after due notice to and appearance by the defendants, made an order appointing Wil-iam Christain its receiver for all the property of the cemetery company, and directing the company officers, of whom Tinsley was one, to deliver over to the receiver on his demand therefor the company's property in their custody, including the books, notes, and moneys on hand. This interlocutory decree was affirmed on appeal by the court of civil appeals for the first district (36 S. W. Rep., 802). The receiver, having capacity to act under the law, promptly gave bond, took the prescribed oath, and duly qualified as such. After this he filed under oath in said court his affidavit for a rule against Tinsley for contempt, alleging specifically the provisions of the above order, his due qualification as receiver, a personal demand by him on Tinsley for certain property of the company—among other items, its minute book—certain described notes, aggregating $1,440.50, and a specified sum of $192.52 of trust money, averring that such property was on hand when the court acquired jurisdiction and was within the terms of said order, and also that
64 Tinsley, holding the custody, as officer aforesaid, of such property, had refused, in wilfull disobedience of said order, to comply with such demand, though having it within his power and ability to do so. The court made its order ruling Tinsley to show cause. After due and reasonable notice, service being accepted, a hearing was had on such affidavit, Tinsley's sworn answer, the replication thereto, and evidence adduced upon the issues, Tinsley and his counsel being present and acquiescing in the course of practice pursued. The court found the facts of the affidavit to be true and those of the answer false in relation to said minute book, notes, and trust fund, but found in Tinsley's favor as to the other items of complaint, including an item of over $3,000. In respect to

the said minute book, notes, and trust fund, the court adjudged Tinsley guilty of contempt in wilfully disobeying its order, fined him $100 as a punishment, and as an aid to the enforcement of its order adjudged that he, having it within his ability and power to comply, be committed to jail until he obey the court's order by paying the fine and delivering over the minute book, notes, and trust fund of money, or until the further order of the court. A warrant of commitment, accompanied with certified copies of both of the above orders, was duly issued, reciting carefully the proceedings, and under that warrant Tinsley was committed to jail on February 6th, 1897; and, as shown by the return of the sheriff of Harris county to the writ of *habeas corpus* granted by this court, Tinsley is now held by such officer in custody by virtue of said warrant, he having failed as yet to obey said orders.

The said district court being one of general jurisdiction, it cannot be maintained that there was any defect of power or jurisdiction in the rendition of the order appointing the receiver and
65 directing delivery to him of the property of the corporation (Church on *Habeas Corpus*, sec. 317). The order for delivery was in the usual form in such case (Loveland's Forms, p. 244). No irregularities, however, in this order, if such there were, could affect its validity in a proceeding for contempt based on disobedience of it (Edrington *v.* Pridham, 65 Tex., 612; Church on *Habeas Corpus*, 2nd ed., sec. 331, and cases cited). It follows that the rule which destroys a contempt proceeding, if its basic order is unlawful as in excess of jurisdiction, can have no application to the case in hand. The predicate or basic order here was clearly a lawful exercise of power constitutionally conferred. (Const., art. 5, sec. 8.)

The disobeyed order being a valid one, the only further inquiries are thus well settled:

"On a *habeas corpus* in a case of commitment for contempt only two questions can be examined, viz: Had the court jurisdiction to commit? and, Is the commitment in legal form? If these questions are affirmatively answered, the court or judge issuing the writ can go no further. It cannot inquire into the truth of the facts adjudicated in the form where the commitment was made." (Church on *Habeas Corpus*, 2nd ed., sec. 315.)

As concerns the procedure and legal form of the commitment, both were in accordance with the most approved practice and by the strictest rule obtaining observed every technical requirement. It would appear, in view of the authorities, *unless* to dwell upon this phase of inquiry (*Ex parte* Kirby, 34 S. W. Rep., 635, 962; Rapalje on Contempts, secs. 93, 94, 95, 103, 104, 111, 120, 125, and 126). It is to be observed, further, that had the committing court found it to be true that Tinsley really held the money and effects
66 adversely to the corporation before the court acquired jurisdiction of the property, that defense would have been held good (*Ex parte* Hollis, 59 Cal., 405). Again, had the court found it to be true that the trust fund of $492.52 was not on hand when it acquired jurisdiction, but was then owing by Tinsley to the corporation as a

debt, it would have held this defense good and remitted the parties to a civil action, as it did in respect to the item of $3,000.00. It did not appear with reasonable certainty that such latter fund was actually on hand in kind when the court acquired jurisdiction. (See *In re* Leach, 51 Vt., 630, and article in 5 Criminal Law Magazine, 174; Rapalje on Contempt, sec. 35.) The distinction is of the radical difference in money on hand as property and money merely collectable as debt. But we will hereafter more clearly bring out the distinction. The defensive points mentioned as contained in Tinsley's answer were found by the court to be a mere sham or pretense, without truth or foundation in fact, and, as we have seen, this court "cannot inquire into the truth of the facts adjudicated in the forum where the commitment was made." (Church on *Habeas Corpus*, 2nd ed., sec. 315.)

The order of commitment, as we understand, is challenged as in excess of jurisdiction on two grounds: 1, that in its requirement for the payment of money it is unlawful as being imprisonment for debt; 2, that in requiring imprisonment until obedience of the orders it exceeded the statutory limitation and was for an indefinite time. As applied to the case in hand neither of these propositions is sound. In respect to imprisonment for debt, that is forbidden by the Constitution. (Const., art. 1, sec. 18.)

To the distinction between the delivery over of money on hand and delivery over of money then owing we have already
67 adverted. As a matter of principle aside from authority, the difference is too obvious to question. Take the present case as an illustration. The trial court found as a fact that $492.52 of the trust fund were on hand in the safe of the corporation and were taken by Tinsley into his custody after the court acquired jurisdiction of that money and not of a debt representing the money. The court ordered this money to be delivered over on pain of contempt. The item of over $3,000 the court did not find to be money on hand when jurisdiction was obtained, but a debt then owing by Tinsley, and so it remitted the receiver to a civil action for collection of the debt. Can it be true that a court may, on pain of contempt, require other personal property to be delivered over to its officers, but that it is powerless to *to* vindicate its dignity as to the species of property known as money? The statement of the proposition ought to be its sufficient refutation. To contend that the court must vindicate its dignity by enforcing the delivery of money through execution proves too much, for, as held by our supreme court, an execution for money cannot issue on contempt proceedings (65 Texas, 612), and hence, if the court may not compel obedience by the usual conviction for contempt, it is absolutely powerless to vindicate its dignity in that respect. But there can be no doubt about the conclusion of the best-considered cases on the subject. "Thus, where the order is made, the process issued, or the judgment or decree rendered by a court having authority or jurisdiction in the matter, neither the regularity of the proceeding nor error committed by the judge or court in the exercise of this jurisdiction can be considered by *habeas corpus*, as where the relator has

been committed * * * for neglecting or refusing after
68 settlement of his account to pay over, under order of the probate court, moneys remaining in his hands as the assets of the estate of which he was administrator; or * * * for refusing to surrender assets to a receiver in obedience to the legal order of a court commanding him to do so, though he be under prosecution or subject to prosecution for stealing or embezzling the same (Tolleson *v.* Green, 83 Ga., 499);" Church on *Habeas Corpus*, 2nd ed., sec. 331. The same author, in a note to section 310 of the work last cited, thus declares the law:

"Fine imposed for contempt is not a debt within the meaning of a constitutional provision providing that 'no person shall ever be imprisoned for debt.' *Ex parte* Robertson, 27 Tex. App., 628; 11 Am. & St. Rep., 207. So with a sum ordered to be paid as alimony, *Ex parte* Perkins, 18 Cal., 60, and imprisonment for contempt in not complying with an order of court to pay over moneys collected by an attorney for his client is not 'imprisonment for debt' and is not prohibited by the Constitution. Smith *v.* McLendon, 59 Ga., 523."

The error of the contention in respect to the punishment exceeding the statutory limitation and being for an indefinite term is believed to be demonstrable. The committing court is a constitutional court, having from that source the inherent power to make and enforce its order within the scope of its general jurisdiction (Const., art. 5, sec. 8). The only method for enforcement of its orders in vindication of its dignity is by contempt proceedings. There is no limitation in the organic law of its creation in reference to the term of imprisonment that may be necessary to enforce its order. By statute and not by the Constitution the court has "power to punish by fine not exceeding one hundred dollars, and
by imprisonment not exceeding three days, any person
69 guilty of contempt of such court" (Rev. Stats. of 1895, art. 1101). The limitation is clearly upon the power to punish for contempt and not on the inherent constitutional right to compel obedience of a violated order. The constitution is the supreme law, and the legislature could never have intended the inherent power mentioned, necessarily implied, to be frustrated by its will or act. Had it so attempted, it is believed such legislation must fall as in conflict with the Constitution. Look at the situation and take the present refractory applicant as an illustration. The court, with the constitutional power to make and enforce the order contumaciously set at defiance, is met by the proposition that the contemnor, aided by the legislature, may override that constitutional power, thus substituting the base for the apex and leaving the court utterly helpless to enforce its lawfully made order. Aside from authority, the proposition seems too monstrous to engender serious doubt. The radical distinction is between fine or imprisonment as a punishment for contempt, as a quasi-criminal offense that the statute deals with, and imprisonment for contempt as an aid to the enforcement of a lawful order, a civil contempt that the inherent constitutional power of the court compasses. A limitation upon the exer-

cise of the latter power is that it must be within the power of the contemnor to comply, and this is specifically adjudged in the present case. Being within his power and ability to comply at any time, his term of imprisonment is not indefinite, but measured by the period of his continued contumacy. It is simply a question whether he will cease his imprisonment by vindicating the court's dignity or continue his confinement in defiance of its authority.

This is voluntary and not involuntary imprisonment for
70 every moment that it lasts. The order of commitment in this case, following approved precedent (Rapalje on Contempts, pp. 250–253), qualifies the commitment by making it subject, in the disjunctive, to "the further order of this court," thus obviating by the reservation any question that could arise by adjournment of the term or from future inability to comply with the order. Let us turn now to the authorities. In Rapalje on Contempts the law is thus declared:

"It is conclusively settled by a long line of decisions that at common law all courts of record have an inherent power to punish contempts committed in *facie curiæ*, such power being essential to the very existence of a court as such and granted as a necessary incident in establishing a tribunal as a court. * * * Each 'superior court' being the judge of its own power to punish contemnors, no other court can question the existence of that power, and the facts constituting the contempt need not be set out in the record. This inherent and necessary power can be exercised by a 'superior court' independently of statutory authority, and such court may go beyond the powers give- by statute, in order to preserve and enforce its constitutional powers, when acts in contempt invade them (State *v.* Morrill, 16 Ark., 384; Johns *v.* Davis, 2 Rob. Va., 729; Rex *v.* Almon, Wilm., 243). Indeed, the conferment of the power by statute upon a superior court of record is deemed no more than declaratory of the common law. * * * There is no distinction, in respect to the inherent right to punish for contempt, between courts of law and courts of equity. The latter possess it as fully as the former." (Secs. 1, 3.)

Comment is deemed unnecessary to show that power to enforce its lawful orders is necessary "to the very existence of a court
71 as such," and therefore, in the case of a constitutional court, by that instrument "granted as a necessary incident in establishing a tribunal as a court." The author last cited thus further considers the subject:

"In the absence of a constitutional provision on the subject, the better opinion seems to be that legislative bodies have not power to limit or regulate the inherent power of courts to punish for contempt. This power being necessary to the very existence of a court, as such, the legislature has no right to take it away or hamper its free exercise (Arnold *v.* Commonwealth, 80 Ky.. 300; Middlebrook *vs.* State, 43 Conn., 257; Tyler *v.* Hammersley, 44 *id.*, 393). This is undoubtedly true in the case of a court created by the Constitution. Such a court can go beyond the provisions of the statute in order to preserve and enforce its constitutional powers by treating as con-

tempts acts which may clearly invade them. * * * A statute which limits the amount of the fine or term of imprisonment which the courts may impose does not deprive them of their power to enforce affirmatively their orders or to enforce any decree, whether affirmative or otherwise, which may be passed upon the final hearing of a cause (*Ex parte* Edwards, 11 Fla., 174). * * * One of the definitions of contempt is the disobedience or resistance of a lawful order of a court or judge, and if a court having jurisdiction should issue an improper order it is obligatory until reversed by an appellate court, and parties may be punished for disobedience or resistance to such orders." (Secs. 11, 16.)

To make perfectly clear the intent of the statute, as applying to quasi-criminal contempts and not to civil contempts, we quote further from the author last cited:

72 "Civil contempts are those quasi-contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court, while criminal contempts are all those acts in disrespect of the court or of its process or which obstruct the administration of justice or tend to bring the court into disrepute, such as disorderly conduct, insulting behavior in the presence or immediate vicinity of the court, or acts of violence which interrupt its proceedings; also disobedience or resistance of the process of the court, interference with property in the custody of the law, misconduct of officers of the court, etc. (citing, among other cases, *Ex parte* Edwards, 11 Fla., 184; Matter of Watson, 3 Lans., N. Y., 408; Hawley *v.* Bennett, 4 Paige, N. Y., 163). In a recent case in Nevada (Phillips *v.* Welch, 11 Nev., 187, 190), Beatty, J., says: 'If the contempt consist in the refusal of a party to do something which he has — ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order in such a case is not punitive, but executive. If, on the other hand, the contempt consists in a threatened act injurious to the other party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive.' * * * *In re* Chiles (22 Wall., U. S., 157, 168), Miller, J., says: 'The exercise of this power (to punish for contempt) has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its order; and, the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.'" (Secs. 21.)

These authorities, it is submitted, leave no doubt that the
73 intent of the statute was to apply, and that it does apply, only to fine or imprisonment imposed as a punishment for a quasi-criminal contempt, and that it has no application whatever, and could not constitutionally have, to a civil contempt predicated upon the continuous disobedience of a lawful order when to cease the punishment would destroy the order.

Having seen that the order of commitment is not unlawful as violative of the statutory limitation of punishment, it is hardly

necessary to dwell at length upon the other phase of the proposition, namely, that the order is unlawful as being for an indefinite term. There are some expressions in the text books on this subject apt, at first blush, to mislead; but the cases cited, upon critical examination, will leave no doubt as to the meaning of the authors. It is quite true that a contempt imprisonment for an indefinite term is unlawful. Such would be an imprisonment not limited in duration by the performance of an act within the ability of the party to perform, but generally "until the further order of the court." This would plainly leave the imprisonment to be measured sole-y by the future pleasure of the court, and would hence be bad; but we have in hand a very different case. Here the imprisonment absolutely ends as soon as the contemnor, who has it within his power and ability to do so, pays the fine and delivers over the property. Should he not do so, still the court reserves the power as against the lapse of the term or future disability or other contingency to discharge him any way. In other words, if he complies he is *ipso facto* discharged. If he does not comply he may, nevertheless, be discharged if the committing court so orders; but a reference to the authorities must remove any question, if such could find lodgment,

on this point. In Church on *Habeas Corpus*, sec. 334, the
74 rule forbidding an indefinite term of imprisonment is stated.

The author cites People *ex rel.* Kinckley *v.* Pirfenbrink, 96 Ill., 68; *In re* Hammel, 9 R. I., 248; *In re* Leach, 51 Vt., 630. We have not had access to the cases cited from Rhode Island, but we have examined the cases from Illinois and Vermont. In neither of them was there such an order under consideration as that passed against Tinsley, and in both of them it was conceded that a commitment until compliance with an order lawfully made would be valid. The author last mentioned (Church), after stating the effect of the decisions on the question of indefinite term, thus proceeds:

"It must be observed, however, that a bare commitment for contempt 'until the further order of the court' is quite different from a case in which a fine has been imposed and imprisonment ordered until a certain act is done or order complied with, 'or until further order of the court,' as this is a valid commitment (*Ex parte* Harris, 4 Utah, 5; *Ex parte* Henshaw, 73 Cal., 486, 494; *Ex parte* Smith, 117 Ill., 63). * * * As the court may enforce compliance with its orders by imprisonment for contempt for their violation, the only remedy for the prisoner is to purge himself of the contempt by showing to the satisfaction of the court his inability to obey the order, and that such inability has not been caused by his own act for the purpose of avoiding the order. The finding of the initial court, however, as to his ability is conclusive upon *habeas corpus*, and he cannot be discharged from imprisonment on this writ if the facts showing jurisdiction appear upon the record. * * * A commitment for contempt, however, for not complying with an order of court must show on its face that the person committed had

the ability to comply, or it will be held bad and the prisoner
75 discharged." (2nd ed., secs. 337, 338.)

In Rapalje on Contempts, secs. 129 and 130, it is thus declared:

"Thus it has been directly held that an order for committal for contempt until the further order of the court as a punishment and not as an aid to the enforcement of a previous order is void for uncertainty. * * * The reason of these rulings is that imprisonment for contempt as a punishment is imprisonment under final commitment for a criminal offense, and its duration should be as certainly defined as that of a sentence for any other crime. On the other hand, where a statute authorizes or prescribes the infliction of a fine as a punishment for contempt of court it is lawful for the court inflicting the fine to direct that the party stand committed until the fine is paid, although there be no specific affirmative grant of power in the statute to make such direction (Fisher *v.* Hayes, 6 Fed. Rep., 63; *Ex parte* Crittenden, 62 Cal., 534). * * * In New York it has been held that a party in contempt for refusing to obey an order of the court to deliver over his property to a receiver may be committed to close imprisonment until compliance with the order of the court and payment of the costs of the proceedings."

The application in this case is simply toying and trifling with the dignity of a court of justice. He contumaciously refuses to yield obedience to the orders in any particular. He does not even offer to deliver up the minute book or the notes which he displayed in court on his trial for contempt. These are lawful orders, and the court must exact obedience of them or prostrate itself at the
76 feet of the contemnor. The case is no ordinary one for contempt. It involves essentially the deep and vital principle of the power and majesty of the courts. Not in harshness nor with oppression has the hand of justice been laid upon Mr. Tinsley. A judge of the kindest and most humane spirit, without feeling and absolutely dispassionate in the matter, patiently heard Mr. Tinsley's defense, sustained it in the most important part to him, and was as generous in the order of commitment as was possible consistent with a proper vindication of the dignity of the court. There is nothing, we submit, for this court to do but remand the applicant to the sheriff's custody, where he may, whenever he chooses, discharge himself by obeying the order which he is wilfully holding in contempt. Any claim that he cannot comply is but a sham and pretense. It is proper to say that, to a suggestion by him after conviction (but contrary to the proof) that he did not have several of the notes, he and his then counsel were both assured that this, if true, did not in the slightest stand in the way of compliance by him, and that the error in this regard, if error it was, would be instantly corrected by the committing court when brought to its attention. Let it be said, in conclusion, that there is not the slightest purpose on the part of the prosecuting counsel, and least of all of the committing judge, to do Mr. Tinsley the remotest injustice, and to this fact he is no stranger. The only emotion of that judge, we are quite sure, is one of regret that Tinsley should thus continue to wantonly defy and thwart the course of justice. The only question is the

survival of the fittest—the court's dignity or the contemnor's contumacy.

Respectfully submitted.

(Signed) EWING & RING,

77 *Attorneys for the Respondent, Albert Erichson, Sheriff of Harris County.*

Endorsed: No. 1227. *Ex parte* Thomas Tinsley, applicant for writ of *habeas corpus*. Argument for respondent. Filed April 9th, 1897. E. P. Smith, clerk.

I, E. P. Smith, clerk court of criminal appeals of the State of Texas, at Austin, do hereby certify that the above and foregoing is a true and correct copy of the original written argument for respondent in cause No. 1227, *Ex parte* Thomas Tinsley, filed April 9th, 1897, by Ewing & Ring, attorneys for respondent, Albert Erichson, sheriff of Harris county; and I do further certify that the original was used by Hon. John P. White, court reporter, in reporting this cause.

Witness my hand and the seal of said court, at Austin, this 17th day of February, A. D. 1898.

E. P. SMITH,

[SEAL.] *Clerk Court Criminal Appeals at Austin, Texas.*

78 In the Court of Criminal Appeals of the State of Texas, at Austin, Texas.

In re THOMAS TINSLEY, Petitioner for Writ of *Habeas Corpus*.

We ask that the court in considering this motion to dismiss confine itself to the allegations of the petition. In the oral argument a good deal that is not in the petition was stated as the facts in the case. It appears from the petition that the receiver demanded of Mr. Tinsley certain notes, the minute book, and $492.52 cash, which he alleged belonged to the company; that Mr. Tinsley declined to turn over this property on the ground that he had the right and the title to same and the right of possession; that he held the notes and minute book referred to by the receiver as collateral security for a note of the corporation, which note of the corporation was given prior to the appointment of the receiver for the loan of money by Tinsley to the company; that he made this loan as a private individual and in the same capacity took the collateral; that as to the $492.50 cash referred to by the receiver, if it was ever due by Tinsley to the company, it was simply assumed by Tinsley on behalf of Wisby, the secretary of the company, who had collected and misappropriated that sum, and he, said Tinsley, therefore was indebted for said cash, if at all liable therefor, as an individual and private person; that Tinsley's claim to said collateral security and as regards said cash money was made in good faith, and that he has a legal right to the collateral until the note is paid, and can be only sued

79 by the receiver for his indebtedness in assuming the $492.52 which Wisby misappropriated; that he is amply solvent to respond to any judgment that might be rendered in the premises,

and that the court had no authority or legal right to deprive him of said collateral or to make him pay said indebtedness by a contempt proceeding, but he is entitled under the constitution to a trial by jury on these issues in the usual method of civil trials, and that he could not be deprived of said property except by due process of law.

It was further alleged in the petition that he did not have and never had a number of the notes demanded by the receiver and included in the order of commitment, and on that account it was impossible for him ever to comply with the judge's order.

It further appears from the petition that Mr. Tinsley was fined $100.00 and ordered to turn over the notes, minute book, and cash above referred to, and he was remanded to the custody of the sheriff until he should fully comply with said order. This order was made February 8th, 1897, and Mr. Tinsley has been in jail since said time until he was released by this court on bail April 9th, 1897—that is, he was confined over two months.

With this statement of the main facts in the petition as a ground for the writ of *habeas corpus*, we submit the following propositions:

First Proposition.

A contempt proceeding is not the appropriate means of trying questions of property rights. Mr. Tinsley asserted in good faith under oath his right to the property in controversy, and the district judge had no authority to force him, under the pains and penalties of a contempt, to give up that right, but could merely direct
80 the receiver to sue Mr. Tinsley for the property.

Authorities.

Ex parte Hollis, 59 Cal., 405.
Ex parte Grace, 79 Am. Dec., 534, 535.
State *v.* Start, 74 Am. Dec., 278.
Baldwin *v.* Hosmer, 25 L. R. A., 743.
Beach on Rec., secs. 216 and 247.
Parker *v.* Browning, 8 Paige, 388.
State *v.* Ball, 5 Wash., 387.
Ex parte Hardee, 68 Ala., 303, and
Thom. Com. on Law of Corp., secs. 6921, 6924, 6928, 6930.

Remarks.

The above authorities clearly settle the point that a court cannot take the property of a third person and hand it over to a receiver in a contempt proceeding. If a court could exercise such power, then property rights, instead of being secured under the Constitution, could be disposed of at the mere discretion of a trial judge. Our State constitution provides for the right of trial by jury in all civil cases as a necessary protection to the property right of the individual citizens; and if a court can override that provision in a contempt case, then the constitutional security is practically abro-

gated. So jealous are the courts of an infringement of this right that they have held in Ham *v.* Live Stock Company, 35 S. W., 427, that that right applies in the hearing of exceptions to a report of a master in chancery. The fact that parties may improperly claim the title to property and thereby defeat to some extent the receivership is not as great an evil as the annulment of the constitutional protection to property rights. It may be considered a choice of the least of two evils, and this court will surely in such a dilemma
81 uphold, as it has ever been inclined to do, even by the writ of *habeas corpus*, the constitutional rights of the citizen. The constitution also provides that no citizen in this State shall be deprived of his property except by due process of law. Due process of law is the method and means laid down by the statutes of our State for trial in the courts of the State by a suit regularly instituted, citation, and trial. It is not due process of law to deprive a citizen of his property by contempt proceedings.

Second Proposition.

This court has jurisdiction to ascertain by a writ of *habeas corpus* whether Mr. Tinsley was in fact guilty of a contempt. He alleges that he never had part of the property, the refusal to turn over which was adjudged to be a contempt. If he never had the property, the district judge erred in finding that he did have it, and that question of fact can't be determined by this court.

Authorities.

Ex parte Taylor, 31 S. W., 641.
Ex parte Degener, 17 S. W., 1111.
Ex parte Robinson, 27 Ct. Crim. App., 628.

Third Proposition.

A prosecution for a contempt can only end in a conviction and an imposition of the statutory penalties or an acquittal; and the court had no power in a prosecution for contempt to make any other order or settle any other issue. Therefore that part of the judgment which undertakes to order the relator to do certain things and undertakes to punish him in default of obeying such order is invalid.

Authorities.

Edrington *v.* Pridham, 65 Tex., 612.
82 *Ex parte* Kirby, 34 S. W., 634, 965.
Revised Statutes, art. 1101.

Remarks.

The courts in this State have no power to adjudicate issues not raised by the pleadings. For an illustration: A court in a trespass suit would not have the right to settle the title to a house or other

property. So relator contends that in a contempt proceeding the court would have no more right to pass on other issues than in a prosecution for theft it would have the right to pass upon the title to the house in which he resides.

Fourth Proposition.

The order of the district judge remanding Tinsley to jail until he should comply with the order of the court was void for uncertainty and indefiniteness.

Authorities.

Ex parte Kearby, 31 S. W., 634 and 965.

Fifth Proposition.

The order of the court confining Tinsley until he should comply with its order was beyond the power of the court to render, because the statute limits the punishment by imprisonment for contempt to three days. Under said order Mr. Tinsley has been in jail for over two months.

Authorities.

Ex parte Kearby, 34 S. W., 364, 965.
Edrington *v.* Pridham, 65 Tex., 612.
Ex parte Robinson, 19 Wall., 505.
State *v.* Kaiser, 8 L. R. A., 584.

Remarks.

It is well settled that the power of a court to punish for a contempt exists independent of the statute. It is an
83 inherent power that has always existed under the common law. The Texas statutes expressly limits the common-law rights of the court to a specific character of punishment. The passage of the statute, which was not necessary to confer any rights, is a clear legislative declaration that the former power of the courts in this respect was too great. The language of the statute is plain and covers contempts of all kinds. In the Edrington case, 65 Texas, this identical statute was held to apply to a constructive contempt—that is, in fact, a contempt for disobeying an order precisely similar to the one herein complained of. That decision by the supreme court clearly settles the point that that statute is applicable to civil contempts, if it were necessary to have the statute construed. The question of the jurisdiction of this court has not been raised, and under the decision of the supreme court, Leggate *vs.* Leggate, 28 S. W., 281, any doubt that might otherwise exist on that point is dissolved.

There were several other questions raised or discussed in the oral argument which *were* are inapplicable to the motion to dismiss, but we do not think it profitable at this time to go into these matters.

We merely now ask that the court overrule the motion and hear the evidence.

Respectfully submitted.

HUDSON & SEAY,
FISET & MILLER,
Attorneys for Petitioner, Thomas Tinsley.

Indorsed: In court of criminal appeals. *In re* Thomas Tinsley, petitioner for writ of *habeas corpus*. Argument for petitioner. Filed April 12th, 1897. E. P. Smith, clerk.

84 In the Court of Criminal Appeals of Texas.

Ex Parte THOMAS TINSLEY. No. 1227.

Supplemental Argument for the Prosecution.

It occurs to us there may be some doubt in the court's mind just how it should decide this matter so as, on the one hand, not to set at defiance the overwhelmingly established rule that the inquiry on *habeas corpus* goes only to the question of jurisdiction or excess of jurisdiction, and, on the other hand, not to disarm itself by a precedent that may, in some future case, prevent interference against the invasion of personal liberty by arbitrary power. It is to relieve the court from any embarrassment in this connection that these remarks will be directed.

The law is deemed so thoroughly settled that a writ of *habeas corpus* operates a collateral attack upon a judgment of conviction for contempt, leaving the only inquiry necessarily one of jurisdiction, that we feel a departure from this rule by the courts would involve usurpation of authority, and that any change of the rule would have to come by legislation from the people—the source of power. But it is equally clear to us that no such change is necessary, and that the law affords an ample remedy against any arbitrary exercise of power by trial courts in inflicting punishment for contempt. That remedy is by writ of certiorari as ancillary to the writ of *habeas corpus*. There cannot be a question about this, nor of the entire effectiveness of such proceedure to obviate any injustice from the exercise of arbitrary power or mistaken exercise of power. If this ancillary writ lies, as we shall show it
85 does, then the alleged contemnor has only, in the first instance, to make the evidence adduced on the hearing of the contempt proceeding a part of the record by bill of exceptions, and if the trial judge refuses a proper bill he has his remedy as in other cases by resort to bystanders. If he has not done this in the first instance he may and must comply with the convicting order so far as it lies within his power and ability to do so, and as to the part with which he cannot comply he may make the showing by proper application to the committing court, and if evidence be adduced, make it a part of the record by bill of exceptions; the action of the court will then, whatever it may be and on whatsoever based, con-

stitute a part of the record. The record thus being complete upon fact as well as pleadings, the alleged contemnor may then apply to this court for a writ of *habeas corpus*, and, as ancillary thereto, for a writ of certiorari, the one to bring up the body and the other the record. This done and it will be competent for this court, as we shall presently show, to review not only the question of jurisdiction or its excess, but also whether the evidence was legally sufficient to authorize the conviction. But let us turn to the authorities that these observations, correct in principle, may find support in precedent. It is provided by Congress (U. S. Rev. Stats., sec. 716) that the supreme, circuit, and district courts shall "have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." The power to issue writs of *habeas corpus* exists, but beyond the statutory provision cited there is no express grant of authority to issue writs of certiorari as ancillary to the writs of *habeas corpus*.

86 Contrast with this statutory authority the constitutional power conferred upon this court and the judges thereof "to issue the writ of *habeas corpus*, and under such regulations as may be prescribed by law issue such writs as may be necessary to enforce its own jurisdiction" (Const., art. 5, sec. 5). The United States courts thus have statutory power to issue the writ of *habeas corpus* and such other writs as "may be necessary for the exercise of their respective jurisdictions."

This court has the constitutional power to issue the writ of *habeas corpus* and "such writs as may be necessary to enforce its own jurisdiction." If the United States courts, under this grant of authority, have power to issue the writ of certiorari as ancillary to the jurisdiction to issue the writ of *habeas corpus*, so clearly has this court. It is plain on principle that in both instances the jurisdiction to grant the writ of *habeas corpus* being conferred, an ancillary writ of certiorari is necessarily a writ to "enforce its own jurisdiction." In Church on *Habeas Corpus*, 2nd ed., secs. 259 and 260, the author, in considering certiorari as ancillary to the *habeas corpus*, thus declares the law:

"In England it may be laid down broadly that the writ of certiorari lies for the removal of all causes from inferior courts. * * * That (the *habeas corpus*) only requires the production of a body of the prisoner and a return of the warrant of commitment under which he is held. But courts have been willing to examine the depositions, and to obtain them the writ of certiorari is resorted to, and which is usually issued at the same time with the *habeas corpus*, directed to the committing magistrate and requiring him to bring

87 up the examinations or depositions, not for the purpose of being acted upon separately under the certiorari, but in order that the court may be furnished with the means of judging in what way they should dispose of the prisoner, and upon the *habeas corpus* and the depositions brought up by the certiorari the case is heard." (Sec. 259.)

The author thus far is stating the law as it obtains in England,

and while the evidence before the committing magistrate is there required to be reduced to writing, yet it is apparent that in our practice the same result may be reached by preserving the evidence in a bill of exceptions. The author then considers the subject according to the doctrine prevailing in the Federal courts, continuing thus:

"As in England, the writ of certiorari has here always been considered in appr-priate cases as ancillary to that of *habeas corpus* and has long been issued by the courts of this country as a means of rendering their jurisdiction under the latter writ effective (*Ex parte* Hamilton, 3 Dall., 17; *Ex parte* Burford, 3 Cranch, 448; *Ex parte* Jackson, 96 U. S., 727; *Ex parte* Bennett, 2 Cranch C. C., 612; *In re* Martin, 5 Blatchf., 303; *Ex parte* Siebold, 100 U. S., 371; Ableman *v.* Booth, 21 How., 506; *Ex parte* Bollman and Swartwout, 4 Cranch, 75, 100). The power of the Federal courts to issue this writ is implied in the fourteenth section of the judiciary act of 1789 (1 U. S. Stats., 81, 82) and section 716 of the United States Revised Statutes. The writ of certiorari has been issued by the United States Supreme Court to a United States circuit court to have brought before the first-named court the proceedings of the last-named court under which the petitioner was restrained of his liberty, together with a writ of *habeas corpus* to produce the body of
88 the petitioner (*Ex parte* Lange, 18 Wall., 163; *Ex parte* Yerger, 8 Wall., 85; *Ex parte* Wells, 18 How., 307; *Ex parte* Siebold, 100 U. S., 371). These two writs may also be issued by the United States Supr-me Court to a district court (*Ex parte* Virginia, 100 U. S., 339; *Ex parte* Parks, 93 U. S., 18). They may be issued by the circuit court to a district court (Patterson *vs.* United States, 2 Wheat., 221) and by both the last-named courts to review the action of a United States commissioner or other committing magistrate who acts under the laws of the United States (*In re* Martin, 5 Blatch., 303; *Ex parte* Bennett, 2 Cranch C. C., 612; *In re* Van Campen, 2 Ben., 419; *In re* Stupp, 12 Blatchf., 501, *contra*; *Ex parte* Van Orden, 3 Blatchf., 167). The rule as to committing magistrates seems to be that the informations, depositions, examinations, etc., taken by and remaining with them in relation to commitments are brought up on certiorari (*Ex parte* Bennett, 2 Cranch, C. C., 612), the evidence is examined on which the commitment was grounded, and the reviewing court will do that which the magistrates ought to have done (*In re* Martin, 5 Blatchf., 303; *Ex parte* Bollman and Swartwout, 4 Cranch, 75, 114; *In re* Van Campen, 2 Ben., 419). In other words, the proper inquiry is to be limited to ascertaining whether the magistrate had jurisdiction and did not exceed his jurisdiction and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality and did not arbitrarily commit the accused without any legal evidence (*In re* Stupp, 12 Blatchf., 501; *Ex parte* Lange, 18 Wall., 163; *In re* Henrich, 5 Blatchf., 414; *In re* Kaine, 14 How., 103, 147; 3 Blatchf., 1, 6, 10; *In re* Farez, 7 Blatchf., 345; *In re* MacDonnell, 11 Blatchf., 79; *In re* Stupp, 11 Blatchf., 124). That facts cannot be reviewed, see *In re* Vermaitre, 9 N. Y. Leg. Obs., 137; *In re* Kaine, 10 N. Y.

Leg. Obs., 257; *In re* Heilbronn, 12 N. Y. Leg. Obs., 65; *Ex parte* Van Aernam, 3 Blatchf, 160.)"

89 The author then considers the use of the writ of certiorari in conjunction with *habeas corpus* in the State courts and says:

"The writs of *habeas corpus* and certiorari are often used as ancillary to each other when necessary to give effect to the supervisory of the higher judicatures, and this procedure has the express sanction of the statute in many of the States." (Sec. 261.)

In 3 Am. & Eng. Ency. of Law, p. 67, sec. 9, it is said:

"The writ of certiorari is frequently used as an ancillary process to obtain a full return to other process. It is the proper ancillary process to a writ of *habeas corpus* when it is desired to bring the full record of the proceedings upon which the party was committed below before the court issuing the *habeas corpus*" (citing State v. Glenn, 54 Md., 572–609, and other cases).

In *Ex parte* John Chetwood, Jr., decided by U. S. Supreme Court Feb. 15, 1897, the court went so far as to grant a writ of certiorari to bring up the record for review in contempt proceedings as an independent rather than ancillary remedy, saying that it was the proper remedy, in the absence of any other adequate remedy "as at common law, to correct excesses of jurisdiction and in the furtherance of justice," but admitting that it "had been ordinarily used as an auxiliary process merely."

Apply the above principles to Tinsley. There being no lack or excess of jurisdiction on the face of the proceedings in the committing court, his application for discharge on *habeas corpus* must be denied, he not having applied for the ancillary writ of

90 certiorari and not having preserved upon the record the evidence taken in the committing court so as to make such ancillary writ of any avail to him; but if it be true that he cannot comply as to any part of the order he has only to comply as far as he can, then apply to the committing court to vacate the rest of the order, preserve upon the record such evidence as may be taken on that hearing, and if the trial court fails to deal justly with him, apply here for a writ of *habeas corpus* and the ancillary writ of certiorari under which both the body and the record will be brought here, and both the evidence and pleadings reviewed in accordance with the principles which we have seen obtain in such case. The only application Tinsley has ever made to the trial court was for a writ of *habeas corpus* under which he proposed to be discharged without obeying in any single particular the requirements of the committing order. We do not care to repeat our argument already on the files, but we refer to it to show that by the concensus of authority the fact, if it be a fact, that the committing court made a mistake in supposing Tinsley had ability to comply as to every part of the order, and the fact, if it be a fact, that he was asserting adverse claim to the corporation could not be a justification to this court to institute a new inquiry here as to those already adjudicated facts. As well might it, without appeal and by *habeas corpus*, under-

take to inquire into the facts upon which rested a regular judgment of conviction for any crime in the catalogue of penal offenses.

We earnestly ask that the dignity of the committing court may be vindicated as against the contemnor at this bar.

Respectfully submitted.

EWING & RING,
Of Counsel fro the Prosecution.

Dic. E.

91 Indorsed: No. 1227. *Ex parte* Thomas Tinsley. Supplemental argument for the prosecution. Filed April 12th, 1897. E. P. Smith, clerk.

Ex Parte THOMAS TINSLEY. No. 1227. Fifth Assignment.

From Harris county.

Motion for Rehearing.

Now comes Thomas Tinsley, applicant herein, and respectfully moves the court to grant him a rehearing and to set aside its judgment of April 14th, 1897, dismissing his application for writ of *habeas corpus*, and says the court erred:

(1.) In hold- that the court *a quo* did not exceed its power or authority in making the order it did in this case.

(2.) In holding that the application for the writ of *habeas corpus* shows that your petitioner is legally restrained and had no right to the writ.

(3.) In holding in effect that the court *a quo* had authority to require your petitioner to turn over the notes which he held as collateral security to the loan that he made to the cemetery company.

(4.) In holding that your petitioner is not entitled to the relief if the order of the lower court is in any respects valid until he has complied with the order as far as he was able.

(5.) In not holding that the order of the lower court being invalid in part was totally void.

FISET & MILLER,
Attorneys for Petitioner, Thomas Tinsley.

92 *Argument.*

We have carefully considered the opinion of the court in this case and respectfully submit that neither upon well-recognized principles nor by the weight of authorities can it be sustained. We would not feel warranted in making such a statement without a very conscientious examination of all the authorities bearing on the case that we have been able to find. The honorable court says, page 8 of its opinion: "The authorities go to the extent of holding that even if the court should commit an error in the judgment as to the property that the parties before the court cannot refuse to surrender the property to the receiver." The Illinois case seems to

go to that extent, but there is no citation of authority in that case to uphold that view, and it would seem to be contrary to the well-established principles of law. The other case cited to support this proposition—Parker *v.* Browning, 8 Paige Chancery (N. Y.), 388—we rely on as being in our favor. In that case the court says: "And if the property is in the hands of a third persons, who claims the right to retain it, the receiver must either proceed by suit in the ordinary way to try his right to it or the complainant should make such third person a party to the suit and apply to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by a process of contempt if it is not obeyed." This certainly means that an order of the court to a third person who claims the property to turn it over to a receiver could not be enforced by the summary proceeding of contempt unless and until the third person was not only made
93 a party to the suit, but, further, the receivership should extend to the property in controversy. The claimant of the property may be a party to the receivership suit and not release his right to have the title to the property claimed adjudicated in the ordinary way. He may be a party for one purpose and not for another, as stated in Havemeyer *v.* The Court, 18 Am. State Rep., 229 and 241 and 237 and '8. In the case at bar the petitioner herein was a defendant, but no receivership was asked for as to his property; hence he was not a party to the receivership case, so far as his claim to the notes in question was concerned, and as to his property rights he had the same right to a trial in the ordinary course as any third person. It is not enough to merely be a party to the receivership proceeding, but the property which the receiver demands and which is adversely claimed by such party defendant must be the property of that party over which the receivership extends. This would seem to be clear upon principle, for why should any property that Mr. Tinsley should happen to own and which the receiver claimed as belonging to the company be taken from him in a summary contempt proceeding? Being a mere party to the suit does not take from him the constitutional protection of a jury trial in civil cases under due process of law. If a receivership over his property should be granted, then he would be in contempt in not turning over his property to the receiver after proper demand; but in the case at bar the receivership applies only to the cemetery company's property, and Tinsley's claim to the property is the claim of a third person, within the meaning of the decisions. This is clearly the view of the chancellor in the case of Parker *v.* Browning, quoted above; else why the expression above
94 quoted, "or the complainant should make such third person a party to the suit and apply to have the receivership extend to the property in his hands." We rest our case upon the authority of the above-quoted case, which seems to be a leading case. This honorable court seems to lay stress upon the further doctrine laid down in this case, that it is the duty of the master in chancery to direct the defendant, where there is a con-

troversy as to the title, to deliver to the receiver the possession of the property, and if the defendant is dissatisfied with the master's decision, his remedy is to apply to the court for a review of that decision, and if he does not do so, he will be compelled by process of contempt to comply with the master's direction. On this point we beg to call attention to the case of Ham *v.* Live Stock Company, 35 S. W., 427, which modifies, by reason of our Constitution, the doctrine here announced—that is, which holds that under our Constitution the appeal on such a question from the master to the court must be tried by the court before a jury. This is the very point we insist on, that we are denied the opportunity of a jury trial, as provided by the Constitution, upon our claim to the notes, etc. With this limitation, by reason of our Constitution, we fully accept the view of the New York chancellor. The same doctrine is announced in State *v.* Ball, 5 Wash., 387, where the court says, "But the receiver takes only the property the defendant has at the time. If he finds property belonging to the defendant not in his possession or under his control, but in the possession of a third person, who refuses to deliver it upon demand, he must either proceed by action in the ordinary way to try his right to it, or the plaintiff should make such third person a party to the action and apply to have the receivership extended to the property in his hands,
95 so that an order may be made which will be binding upon him and which may be enforced in a summary way by process of contempt if not obeyed." We submit that under this language, which is the gist of the decision in that case, that not only was it necessary to make Tinsley a party to the suit, but, further, that the court, before he could be ordered to turn over the collateral notes which he claimed, should have granted a receivership over said notes as being the property in the hands of said Tinsley. In Beach on Receivers, secs. 216, the same doctrine is announced, and there the case of Gelpeke *v.* Railroad Company, 11 Wis., 481, is cited. We respectfully ask the court in this connection to read that case as supporting our contention. Beach on Receivers, sec. 247, is very sweeping in its statement. He says: "It is also equally well settled that in a proceeding to punish for contempt of court the question of the title to property cannot arise or be adjudicated. * * * It (the court) will not directly or indirectly assume to consider or decide to whom the property belongs, or to decide that the receiver has or has not the right of possession in and to it." It certainly will not be contended that this language does not cover the case in question and render illegal a judgment in a contempt proceeding as to the title to property or the right to possession of it. The case of *Ex parte* Hollis, 59 Calif., 405, which this court in its opinion says is a well-considered case, we respectfully insist, decides the doctrine we contend for. Directly following the language quoted in the opinion in this case the court says: "The petitioner then was not an officer of the court nor a party to the proceedings in insolvency. He claimed the property under title adverse to all the world. As an adverse claimant he was not before the court. (Neither was Tinsley
96 a party defendant to the receivership as an adverse claimant of the notes in question.) The court had no control or juris-

diction over him or over his property. (Neither did it surely have, by making Tinsley a party to the receivership, any control over his private individual property.) And it could not, by a mere order to show cause why he should not be punished for contempt of court, make him, as an adverse claimant, a party to the proceedings and adjudge his right to the property in a summary way. * * * If his title is claimed to be invalid as fraudulent and void, he is entitled to be heard according to the forms of law. Proceedings to punish him for contempt for not delivering it up, without a trial according to law, to another who claims it are not the appropriate proceedings for the trial of issue of title." (See page 413 *et seq.*) The point we make is that Tinsley was not before the court as an adverse claimant of these notes by being made a defendant in the suit for a receiver. He was as much a third person in his assertion of right to the notes as any one else, and under the doctrine above announced his claim to the notes could not be adjudicated by the summary proceeding of a contempt. He was essentially a third person within the meaning of all the cases which hold that the title of a third person cannot be decided upon the claim of the receiver by contempt proceeding. The Illinois case, however, if it is authority at all, goes to the extent that even the claim of a third person can be so decided, and that a third person's disobedience to the order to turn over his property is a contempt which a higher court cannot even inquire into by writ of *habeas corpus*. Either the Illinois case quoted at length in the opinion is not law, or the other cases and the text books quoted and cited by this court are wrong; and we submit
97 that this court cannot select that one case and follow it in preference to all the other cases. We think the case of Havemeyer *vs.* The Court, 18 Am. State Rep., 237, '8, 229, and 241, lay-down the correct view of the law. We further ask consideration of the case of Bowery Bank *v.* Richard, 3 Hun. (N. Y. Sup. Ct.), 369, and Bank *v.* Schemmerhon, 9 Paige Chancery, 372 (38 Am. Dec., 555). The case of Baldwin *vs.* Hosmer, 25 L. R. A., 743, decided in 1894 by the supreme court of Michigan, clearly recognizes our contention. The officers of local branches of the Order of Iron Hall refused to turn over funds of the company in their hands to a receiver who had been appointed by the court. The question was whether these officers should be held in contempt for their refusal. The court said, pp. 743: "Proceedings for contempt are not appropriate for the trial of issues involving the title to this fund, or to determine the validity of the lien which the garnishees claim," citing authorities. Under the Illinois case quoted by this court the contempt order would have been proper. Again, this case is authority on the point that funds in the hands of a third person upon which a lien exists did not have to be turned over to the receiver, on the theory that no injury will be done and the lien protected. A party that has possession has the right to keep possession, and that right is a valuable right, which the court cannot take away by promising to protect the lien even in the hands of the receiver. The Havemeyer case, 18 Am. State Rep, page- 237, '38, is good authority also on this question. In Davis *vs.* Graves, 16 Wall., 218, the Supreme

Court of the United States, on the authority of Parker *vs.* Browning, 8 Paige, 388, holds that property cannot be taken summarily from a third person by an order of the court in a receivership.

98 We further think the authorities—*Ex parte* Grace, 78 Am. Dec., 534; State *v.* Starte, 74 Am. Dec., 278, and *Ex parte* Hardee, 68 Ala., 303—are all applicable and in our favor.

While this court will not inquire into mere errors of law committed by the court *a quo*, it will inquire into "the jurisdiction of the court to render a particular decision." *Ex parte* Hollis, 59 Calf., 407. "The judgment is not conclusive upon the question of the authority of the court that rendered it." *Id.* In Homan *vs.* Mayer, 34 Texas, 668, it is held that the authority of the court to render the particular decision on contempt may be inquired into by *habeas corpus* (*Ex parte* C. B. Pack, decided April 28th, '97). We understand, however, that this honorable court recognizes this doctrine in its opinion in this case.

And, further, the court bases its decision on the point that Tinsley had simply a lien on the notes and minute book, and that this lien would be fully preserved in the hands of the receiver; that the effect of the court's order was merely to place this property in the hands of the receiver for administration under order of the court, and that for this reason the court had the power to make the order as to the notes and minute book. We submit that the court has misapprehended the character of the claim that Tinsley asserts to the said property. He holds this property as collateral security, and under the well-settled rules regarding such security he had the right at any *y*ime after default on the payment of the principal debt to sell the collateral. In National Bank *v.* Ben Brook Company, 27 S. W. Rep., 298–'99, the court of civil appeals says, upon the authority of a great number of cases: "The court had no right or authority to interfere with appellant's possession of the

99 warrants, without first requiring the payment of the debt which they were pledged to secure." And further: "And the fact that appellant was about to sell the warrants under the power granted to it in said contract furnishes no sufficient grounds for a court of equity to summarily wrest said securities from the possession of appellant and place them in the hands of a receiver." The very purpose of collateral security is to realize on it upon default of the main debt. If Tinsley could be forced to turn over his collateral to the receiver, how could he exercise his right of selling? We submit that your honors have overlooked the character of the lien which Tinsley claims. We therefore submit, as regards the notes and minute book, the court had no right to adjudicate by a contempt proceeding the claim of Mr. Tinsley, although he was nominally a party to the suit, because as to his claim to these notes he was a third person, who might insist upon his constitutional protection of a jury trial and suit in the ordinary procedure. We further submit that if the order was void in this respect it was void entirely and could form no proper basis for imprisoning your applicant. We think this is decided in principle in Railway Company *v.* Jarvis, 80 Texas, 467. But the court could clearly not by

a contempt proceeding enforce payment of the $492.52, an indebtedness due by Tinsley, so that the entire basis of the judgment falls.

We respectfully ask that the rehearing be granted.

FISET & MILLER,
Attorneys for Petitioner, Thos. Tinsley.

Indorsed: No. 1227. *Ex parte* Thomas Tinsley. From Harris county. Argument on rehearing. Filed April 26th, 1897. E. P. Smith, clerk.

100 *Ex Parte* THOMAS TINSLEY. No. 1227. Fifth Assignment.

From Harris county.

Supplemental Argument on Motion for Rehearing.

In addition to the argument and authorities discussed therein on the motion for rehearing, we respectfully ask the court's consideration of this supplemental brief.

II.

As to the position in the court's opinion that Tinsley had simply a *line* on the notes and minute book that would be fully protected in the hands of a receiver, we rely entirely upon the case of National Bank *v.* Ben Brook Company, 27 S. W. Rep., 298–'99, and cases there cited. Tinsley held the notes and minute book as collateral security, the efficacy of which would be completely destroyed under the view of this court announced in its opinion. We are probably responsible for this mistake of the court, as we failed to point out in argument the particular nature of the lien. We do not controvert the position taken in the opinion as applicable to ordinary liens or mortgages. We can add nothing on this point and simply ask consideration of the above-cited case, with the authorities therein mentioned.

III.

Upon mature consideration we feel satisfied that Tinsley is a third person, so far as asserting his right to the notes and minute book is concerned, and is protected under the decisions cited by us in our brief on the motion to dismiss the petition for *habeas corpus*. In our argument on the motion for rehearing we attempted to show this. Tinsley was a nominal defendant in the suit for a receiver.

101 The plaintiffs in that suit sought to have the property of the company, and not of Thomas Tinsley, put into the hands of a receiver. He, with all the other officers of the company, was made a party defendant; but it was not attempted in that case, either in the pleadings or in the judgment appointing the receiver, to subject any property that he owned in his private individual capacity to a receivership. The decree attached as an exhibit to the petition expressly applies to him as an officer of the company—that is, re-

quires him to turn over property that he holds as an officer. The grounds set out in the petition for a receiver would not warrant extending the receivership over his property, and hence the receiver had no more right to wrest from him his individual property than from any stranger to the proceeding. If by merely making him party defendant in the main proceeding the receiver could summarily dispossess him under contempt proceeding of his private property, the whole argument why strangers' or third persons' title cannot be so adjudicated would fall to the ground. Such persons' rights could simply be destroyed by making them nominal parties to the original suit. The main suit is, as it were, a proceeding *in rem*, a proceeding to subject property of the company only to the orders of the court. If Tinsley or any one else has possession of the property and claims the right of possession under a special title to it, that right cannot be disposed of by summary contempt proceeding. Were this not true, the constitutional protection of due process of law and jury trial would be greatly jeapordized. If the power, without the right of an appeal or jury trial, were lodged in every district court, to adjudicated, upon simple notice to a party, his right and title to property and enforce the adjudication by perpetual imprisonment, where would our boasted constitutional liberties be? While it is true that
102 we should not presume that the district court will do wrong or be tyran-ical and oppressive, it should not have and was never intended to have the power to be and do so. The checks and balances of the Constitution were intended, among other things, to prevent such power. It is all a question of power. The danger lies in admitting this arbitrary power.

It is a very different question to ask if the district court cannot summarily appoint a receiver. Our statute (Revised Statutes, art. —) protects parties against errors of judgment in appointing receivers by allowing an immediate appeal to the court of civil appeals. The appointment of a receiver is necessary to preserve the property in litigation pending a receivership. There is no necessity, however, for disturbing the usual proceeding provided for determining controverted issues. The entire machinery of the courts, as carefully outlined in the Constitution and detailed in the statutes, was provided to determine controverted issues. Is the district judge alone to have the power, if he improperly sees fit to use it, to render useless this complicated system of obtaining justice? The question involved is not one as to the power of the court to enforce its decrees or to preserve its dignity or authority, but as to its power to summarily determine the rights of a party asserting a *bona fide* claim to property. If, in the main suit, the receivership had been extended over the property of Tinsley, then he would have to give up the property under the order of the court; but the order in question requires him to give up his private, individual property to a receiver who only has the right to the property of the corporation and who is as to him a third person. There is no necessity for such power in the district court. It is inconsistent with all the provisions of our laws regarding executions and enforcement of de-

crees. If Tinsley's claim to the property is unfounded,
103 the receiver, if he must have immediate possession, can attach, garnish, or sequestrate the property in the hands of Tinsley or get an injunction against his transferring the property until the questions of titles, etc., can be finally adjudicated. The supreme court of Michigan said: "Imprisonment as a means of coercion for civil purposes is not allowed by law until all other means fail" (60 Mich., 235). In many States there is a system known as proceedings in aid of execution, by which a party can be forced under contempt proceedings to turn over the property which cannot be reached by ordinary execution to a receiver to be used in payment of his debts. We think these proceedings are entirely analogous to the proceeding attempted in this case, but it has been universally held that where a third person claims the property sought to be so taken that the only course open to the receiver was to sue the party claiming the property in the ordinary way. The following cases that we have read we think applicable and will throw much light on our contention:

Rodman *v.* Henry, 17 N. Y., 482.
Crounse *v.* Whipple, 34 How. Prac., 333.
Clapp *v.* Lathrop, 23 How. Prac., 423.
People *v.* King, 9 *id.*, 97.
Gasper *v.* Bennett, 12 *id.*, 301.
Teller *v.* Randall, 26 *id.*, 155.
Goodyear *v.* Betts, 7 *id.*, 187.
Stuart *v.* Foster, 1 Hilt., 505.
West Side Bank *v.* Pugsley, 47 N. Y., 368.
Barnard *v.* Kobbe, 3 Daly, 373.

The same principle is announced by the Ohio courts.
Edgerton *v.* Hanna, 11 Ohio State, 323.
104 Union Bank *v.* Union Bank, 6 *id.*, 254.

See to the same effect Nebraska decisions *in re* Havlick, 45 Neb., 747. (We especially commend this case to the court's consideration.)

Estey *v.* Company, 47 N. W. Rep., 1025, and cases cited.
Reardon *v.* Henry, 47 N. W., 1023.
Geary *v.* Geary, 63 N. Y., 255.
O'Gara *v.* Kearney, 77 N. Y., 423.

See generally 2nd Freeman on Execution, chap. 17 and chap. 29, as to the means by which the claim of the third person to property is ordinarily determined. Why are the proceedings of garnishment and attachment and sequestration and injunction provided in our statutes with the necessary securities and restrictions surrounding them to avoid oppression if a *nisi prius* judge can by a simple *ipse dixit* declare the claim of any one to property unfounded in fact and enforce decree, not by execution, but by perpetual imprisonment? It is a dangerous power to admit, a most far-reaching precedent to establish. If it is necessary to enjoy this power if the

party whose property is to be taken be made a party to the main suit, then that difficulty can be brushed aside by simply adding his name in the petition and serving him with citation. We do not believe and cannot believe that this court, which has so often been the protector of liberty and has preferred to err on the side of the liberal construction of the laws, will countenance the dispossession by summary process and under the pains of imprisonment of your applicant's property rights. While it is important that the dignity and authority of the courts should be respected and maintained, that cannot be done at the expense of constitutional rights.

105

III.

As to the power of the court to inquire into the question submitted by *habeas corpus* proceedings, we ask consideration of the following cases:

In re Woods, 82 Mich., 81.
In re Hess, 1st N. Y. Supp., 812.
People *v.* Kelley, 24 N. Y., 74.
Keenen *v.* The People, 58 Ill. App., 247.
Reardon *v.* Henry, 47 N. W., 1022.
In re McKane, 68 N. W., 164.
State *v.* Kuman, 40 Am. St. Rep., 307.
Paterbaugh *v.* Smith, 19 Am. St. Rep., 30.
4 Encyc. of P. & P., 1815.

In those States where an appeal from a contempt proceeding is allowed the appellate court cannot on a *habeas corpus* proceeding go into questions of fact as found in the contempt proceedings. Such is the case cited in the opinion of this court, *In re* Rosenberg, 90 Wis., 581, and in many similar cases. In this State, however, there is no appeal from a contempt judgment, and the reason for these decisions fail-. It has been so expressly held in the well-considered cases, *Ex parte* Senior, 19 Sou., 653, and Tyler *v.* Connolly, 2 Pac., 417.

IV.

The judgment in the case at bar is void because the statute limits the punishment for contempt to three days' imprisonment, while the judgment is for an indefinite imprisonment.

A more thorough consideration of the authorities confirms us in the view here expressed. The statute is general in its language and covers all the characters of contempt. There was
106 no need for a statute, as the power to punish for contempt was inherent in the courts at common law. Its purpose therefore was to limit the common law in harmony with the progressive spirit of the age. The following cases establish this contention:

People *v.* Risely, 38 Hun., 280.
People *v.* Tweed, 60 N. Y., 559.
In re Patterson, 99 N. C., 407.
People *v.* Carter, 48 Hun., 165.

Church on *Habeas Corpus*, secs. 337 and 335.
Ex parte Sweeny, 1 Pac. Rep., 379.
Langdon *v.* Judges, 76 Mich., 367. (This case shows that the statute applies alike to civil and criminal contempts. See page 373.)
Scott *v.* Chambers, 62 Mich., 538. (See this case also as to the rights of third persons.)
4 Encyc. of P. and P., 801, note 3.
Levan *v.* District Court, 43 Pac., 574.

It is held generally that all contempts are criminal in their nature and are to be considered as criminal offenses. The rule, therefore, that the judgment in a criminal case should be definite in time, and, further, that if the judgment were void in part it would be void altogether, is applicable.

United States *v.* Patten, 29 Fed. Rep., 775, 778.
Foster's Fed. Prac., 725.
4 Encyc. of P. and P., 766.
2nd Bish. Crim. Law, sec. 242, par. 343, and cases cited.
Church on *Habeas Corpus*, 330, note 8.
N. O. *v.* Company, 20 Wall., 292.
Whitten *v.* State, 36 Ind., 196.
35 Ill. App., 505.
2 Pac. Rep., 417.
107 *Ex parte* Gould, 33 Pac., 112.
Denver R. R. Co. *v.* Atchison R. R. Co., 2 Am. & Eng. R. R. Cases, 1.
Van Zandt *v.* Company, 2 McCreary, 642.

We respectfully ask that the motion for rehearing be granted.

FISET & MILLER,
Attorneys for Petitioner, Thos. Tinsley.

Indorsed: No. 1227. *Ex parte* Thomas Tinsley. From Harris county. Supplemental argument on motion for rehearing. Filed May 10th, 1897. E. P. Smith, clerk.

108 *Ex Parte* THOMAS TINSLEY. No. 1227. 5th Assignment.

From Harris county.

Opinion.

This is an original application to this court for a writ of *habeas corpus*. It appears that heretofore, in the district court of Harris county, Drew and others brought a suit against the Houston Cemetery Company, a corporation, and others, and, among other things, prayed for the appointment of a receiver. Wm. Christain was appointed receiver, and in the judgment appointing him he was ordered, after giving bond and making affidavit, etc., to take possession of all the property of the Houston Cemetery Company, and,

among other things, certain described notes, the minute book of said corporation, alleged to be in the hands of Thomas Tinsley, and also $492.52, a trust fund alleged to be in the hands of said Thomas Tinsley. Thomas Tinsley was a defendant in said suit, and the order was directed to him to turn over said property to the receiver; said receiver demanded the same, and on the refusal of said Tinsley to make the delivery thereof a writ of attachment was served on him and he was brought before the court to show cause why he should not be committed for contempt of court in failing and refusing to deliver said property to the receiver. The applicant Tinsley filed his answer, and the matter was presented to the court, evidence heard on the issues presented, and the court made its order finding said Thomas Tinsley in the sum of one hundred dollars,
109 commit-ing him to the custody of the sheriff and to the jail of Harris county as for a contempt of court on account of his failure to turn over and deliver said property to the receiver, and the sheriff was instructed to hold him until said fine was paid, and, further, to retain him in custody until said property should be delivered to the receiver, or until the further order of the court. Said Thomas Tinsley made an application for a writ of *habeas corpus* to this court, which was granted, and the writ issued. On his being brought before the court the respondent moved to dismiss the application and said writ and remand the relator to the sheriff of Harris county for the reason "that said application fails to show either by the recitals therein or the exhibits thereto attached that the judgment from which the relief is sought is void, but, on the contrary, the judgment attached thereto shows upon its face an adjudication, and the relator had wilfully placed himself in contempt of said court and adjudicates the question as a fact here set up to avoid said judgment against relator. If the truth of all the facts alleged be conceded, the same are not sufficient in law to nullify the judgment rendered. (2.) Said application is insufficient for the further reason that it fails to show that the relator has complied, so far as was within his power, with the orders of the court on which the contempt is based."

This brings before us the question whether or not the matters and things contained in the application show a void judgment or one which is merely erroneous, the rule being that where a court has jurisdiction over the subject-matter, although its judgment
110 may be erroneous, it is not void, and in such case it cannot be reviewed on *habeas corpus;* but where the court is without jurisdiction of the subject-matter or of the parties or lacks power to make the order in the particular case it cannot punish for contempt on a disobedience of such order.

See St. Louis, K. & S. R. Co. *et al. vs.* Wear (Mo.), 36 S. W. R., 357.

In re McCain (S. D.), 68 N. W. Rep., 163.

Ex parte Kearney, 7 Wheaton, 211.

Ex parte Kilgore, 3 Ct. Cr. Crim. Apps. (Tex.), 247.

On the motion to dismiss the question is to be tried on the application for the writ, and we will set out such parts of the petition as are essential to a disposition of this case. As stated before, the relator sets out in his application for the writ the proceedings on which the court below committed him for contempt. That is, perhaps, not all of the proceedings, but the substantial features of the suit and the main facts upon which the court based its action, which are as follows: On the 23rd of April, 1896, Drew and others (some of the stockholders in the Houston Cemetery Company, a private corporation) brought suit in the district court of Harris county against said corporation and Thomas Tinsley and others were made parties defendant therein. The corporation and the defendant answered in said suit. Among other things the object of the suit was the appointment of a receiver to take charge of the property of the alleged insolvent corporation. On the hearing William Christain was appointed receiver, and the court made its order requiring Thomas Tinsley to turn over and deliver to said receiver all of the property of said corporation in his possession. On the 21st of February, 1897, thereafter, said receiver demanded of
111 said Tinsley that he turn over to him a list of the notes described in Exhibit A to the application and a certain book known as the minute book of said corporation, and also $492.52 in cash, alleged to be a trust fund in the possession of said Tinsley and belonging to said company. It is alleged that the applicant refused to turn over this property to the receiver on the ground that he did not have and never had in his possession certain of said notes (which are set out in said petition), and that the remainder of said notes (as set out in Exhibit B to the petition) and the minute book of said corporation said applicant, Thomas Tinsley, claimed to hold and to have the right to hold in possession as collateral security for a certain note of $1,500 for money loaned by him to said corporation prior to the appointment of the receiver. As to the $492.52 applicant alleges that he never held said money in trust, but that one Wisby held the same and had appropriated it, and that applicant had simply assumed to pay the same to the corporation, and that he did not hold the same in trust, but that it was a debt due by him to the company. He further alleges that he is solvent and able to respond to any judgment that may be rendered against him in favor of the receiver on account of said property. Applicant alleges that said order requiring him to deliver certain property and pay over said money is without due course of law and is null and void, and that an adjudication by the court that he was guilty of contempt in refusing and failing to do so and fining him $100 is null and void. He further contends that said judgment is null and void because John G. Tod, the judge who tried said cause, was at the date thereof related to C. H. Milby and wife, Maggie
112 Milby, within the third degree, and that C. H. and Maggie Milby were stockholders in said corporation. He further says that said judgment and commitment were null and void because the imprisonment is for an uncertain and indefinite period of time and because he is not able to comply with said order, and he

further alleges that the statute fixes the amount of punishment at a fine of one hundred dollars and imprisonment not exceeding three days, and that the judgment was excessive, and so null and void. He further charges that the matters set up and alleged do not and could not constitute a contempt, and that his confinement under said order of the court is null and void.

In connection with the petition the judgment of the court appointing a receiver and ordering the said Thomas Tinsley to turn over the property in his possession to the receiver, Wm. Christain, is attached thereto as an exhibit. Also the following, by exhibits: An application on the part of said receiver showing to the court his demand upon Tinsley for said property and his refusal to turn over and surrender the same to him, and praying that he appear at the court-house at a time fixed by the court to show cause why he should not be punished for his misconduct in disobeying said order as for a contempt of court. Also the orders of the court based thereon requiring the defendant, Thomas Tinsley, to show cause before the district court of Harris county why he should not be punished for contempt of court in disobeying the decree of the court of April 3rd, 1896, etc., and also the judgment of the court on said application, as follows:

MONDAY, *February 8th*, 1897.

113 OCTAVIUS C. DREW *et al.* — HOUSTON CEMETERY COMPANY *et al.* } No. 18969.

In the matter of William Christain, as receiver herein, informant, against Thomas Tinsley, respondent, for contempt, etc.

This 6th day of February, A. D. 1897, came on to be heard in open court the proceedings for contempt of this the district court of Harris county, Texas, against the respondent, Thomas Tinsley, upon the affidavit of said William Christain, as receiver, for a rule to show cause, etc., and the court's rule to show cause therein, both of February 2nd, 1897, and the answer of said respondent to such rule and the replication of said informant to said *such*, both this day filed herein, said respondent meantime having had due and reasonable notice in this behalf, and appeared in person and by attorney and announced ready for the hearing; and the court having heard such affidavit, rule to show cause, answer, and replication, and the evidence adduced, both oral and written, in support of the issues so tendered and joined, as well as the argument of counsel, doth find and declare that the facts set forth in said affidavit and the special pleas of said replication are true as concerns the minute book, notes, and trust fund of four hundred ninety-two dollars and fifty-two cents, as herein specified, and that said respondent, under the evidence adduced, has failed to show cause, as required by the answer aforesaid, good or sufficient in law. Therefore it is considered by the court, ordered, and adjudged that the said re-

spondent, Thomas Tinsley, is guilty of a contempt of this
114 court in having willfully disobeyed this court's order made and rendered in the above numbered and entitled cause on, to wit, the 23rd day of April, A. D. 1896, appointing William Christain receiver of the property of every description of the Houston Cemetery Company, etc., etc., by failing and refusing to turn over to said William Christain, as such receiver, after he had taken the oath and given bond, which was approved, and duly qualified as such receiver, as required by said order, notwithstanding due and personal demand made therefor upon him, Thomas Tinsley, by said William Christain, receiver as aforesaid, and though having it then and now within his power and ability to comply, the following-described property of and belonging to the said Houston Cemetery Company, covered by such order, to which it was entitled, the same being then and still held and controlled by him, Thomas Tinsley, as an officer of said Houston Cemetery Company, to wit: 1st, the notes belonging to said Houston Cemetery Company as its bills receivable then and there*to* on hand and covered by and embraced in said order of April 23rd, 1896, amounting to the sum of fourteen hundred and forty dollars and fifty cents, as shown by the schedule marked Exhibit A, attached to the aforesaid affidavit, which schedule the clerk is directed to record on the minutes in connection herewith, and to be taken as a part hereof; 2nd, that certain book belonging to said Houston Cemetery Company and known as its minute book then and there on hand and covered by and embraced in said order of April 23rd, 1896; 3rd, the portion of the trust fund to which said Houston Cemetery Company was entitled under its charter and by-laws which accrued for and during the years A. D. 1894 and A. D 1895, covered by and embraced in said order of
115 April 23rd, 1896, amounting to the sum of four hundred ninety-two dollars and fifty-two cents; and the court doth further consider and adjudge, order, and direct that the said contemnor, Thomas Tinsley, pay to the sheriff of Harris county, Texas, a fine of one hundred dollars as a punishment for the contempt aforesaid, and that he forthwith turn over and deliver to said William Christain, as receiver aforesaid, the said notes, minute book, and trust fund of four hundred ninety-two dollars and fifty-two cents as an aid to the enforcement of the aforesaid order of April 23rd, 1896, and that in default of immediate payment of said fine and of the delivery and turning over forthwith to said William Christain, as receiver aforesaid, of said notes, minute book, and trust fund of four hundred ninety-two dollars and fifty-two cents, he, the said contemnor, Thomas Tinsley, be imprisoned in the common jail of Harris county, Texas, until he shall pay the said fine of one hundred dollars, as herein directed, and until he shall turn over and deliver to the said William Christain, as aforesaid, the said sheriff affording him, said Thomas Tinsley, a reasonable opp*u*rtunity to do so, if he shall so desire, the said notes, minute book, and trust fund of four hundred ninety-two dollars and fifty-two cents, and until he shall pay the sheriff aforesaid his cost for executing the commitment hereunder, or until he shall be discharged by the further order of

this court, and that, to carry this judgment into effect, the clerk of this court do forthwith, under his hand and the seal of this court, issue a commitment in terms of the law, reciting generally the proceedings herein, and to which there shall be attached as Exhibit "A" thereof a certified copy of the aforesaid order of April 23rd, 1896, under the seal of this court, and to which there shall
116 also be attached, as Exhibit "B" thereof, the schedule of the aforesaid notes annexed to the aforesaid affidavit, or a copy of such schedule, and the clerk of this court shall also, in addition to the warrant of commitment, deliver to said sheriff a certified copy of this judgment, to be held by him as further evidence of his authority for the commitment hereby directed by the court.

JOHN G. TOD,
Judge 11th Judicial District of Texas.

(A schedule of the notes referred to in the above order accompanies this judgment.)

Following this order is a copy of the writ of commitment. All of these papers appear to us to be in regular form.

As to the proposition of the relator that said judgment appointing a receiver is null and void because some of the stockholders were related to the judge making the appointment of the receiver, in view of the decision of the supreme court in said case (which was appealed), the same is not tenable. (See Houston Cemetery Company *et al. v.* Drew *et al.*, 36 S. W. Rep., p. 802.)

The applicant refers us to a number of cases to support his contention that the court had no authority to make the order which it did, requiring the said Thomas Tinsley to turn over said property to the receiver, it being shown that he set up a claim thereto in his own right, insisting that if the court could enforce such order it would be authorizing one person to take the property of another without due process of law; that if the receiver had any claims to the same that the courts of the country were open to him, and to recover the same he could bring his suit as any citizen, and
117 that the action of the court in this regard was tantamount to imprisoning the applicant for debt.

Among other cases, he cites us to the case of Edrington *v.* Pridham, 65 Texas Rep., 612. But we do not understand that case to decide the question of the power of the court to punish for contempt. This matter was not before the court. The question really decided was that the proceeding being originally in the nature of a contempt, and having been conducted as a contempt proceeding, a judgment for debt, with execution, could not be rendered against the defendant. The court say, in passing, that the "statute authorized the district court to impose for contempt a fine not exceeding one hundred dollars, but if this limitation is unauthorized (Rapalje, sec. 11) we cannot consider a judgment in favor of the receiver for $2,500.00 to be collected by execution as a- exercise by the court of its inherent power to fine for contempt. Such a judgment does not vindicate the dignity of the court; it redresses private injury. The prosecution

of the plaintiff in error for contempt did not warrant the civil judgment against him."

In *Ex parte* Hollis, 59 Cal., 405, the court held that Hollis was not a party to the suit, and the order requiring him to turn over certain property which he claimed as his individual property was without authority of law and void. This is a well-considered case, and a number of cases in bankruptcy are cited, and all these are to the same effect, that the court has no authority to act by its orders on a third party and compel him to turn over property to an officer appointed by the court. We quote from Hollis case as follows: "The question therefore arises whether a superior court has au-
118 thority to adjudge a party guilty of contempt and to fine and imprison him for not turning over to a receiver in insolvency moneys and effects, part of which he claims adversely to the insolvent debtor, and the other part is also claimed adversely by a corporation with which he is not connected as an executive officer or director. We think such a power cannot be exercised over a party unless he has collected and holds the money and effects as trustee for the estate of the insolvent debtor, and the court has jurisdiction over him as an officer of the court or as a party to the proceedings (*Ex parte* Perkins, 18 Cal., 64; *Ex parte* Smith, 53 *id.*, 204; *Ex parte* Cohn, *id.*, 196). It is not claimed that the Real Estate and Building Association was an officer of the court or a party to the proceedings in insolvency, nor was the petitioner. Verifying the answer of the insolvent debtor did not make him a party. Process against the corporation brought the corporation alone into court; being in court it verified and filed its pleadings according to law. It was the only party to the record. Neither the president, secretary, the individual directors, nor stockholders were parties to the proceeding (Apperson *v.* The Mutual Benefit Life Insurance Company, 38 N. J., 272)." To the same effect is the case of State *ex rel.* Boardman *v.* Ball, 5 Wash., 387.

Beach on Receivers, sections 216 and 247 (to which applicant refers), is simply to the effect that the court in ordering the property to be turned over to a receiver will not try the title to the property, and is not authorized to make an order unless the party in possession is before the court.

Thompson on Receivers, sections 6921 and 6928 (to which we are cited), is to the effect that the receiver has no right to seize
119 goods in the possession of a stranger to the action and make himself the arbitrato- of the title and the right to the possession of said goods, but it is his duty to bring the proper action to recover possession. Process of contempt cannot be resorted to to force third parties to deliver property, of which he has never had possession, to a receiver, though the receiver may have authority to obtain possession of the property from them by proper proceedings.

To the same effect is High on Receivers, sections 165 to 170, inclusive.

In the case before us the applicant was not a stranger to the proceeding. He avers that he was a party, and he claims not the fee in the notes and minute book, but simply that he had a lien on the

same, and he insists that the court had no authority and no power to require him to surrender the same to the receiver, because, he says, having a lien, he was entitled to the possession. Now, there can be no question that the district judge had jurisdiction of the case, had authority to appoint a receiver, and had authority to order and require the officers of the corporation to turn over the property of the corporation in their hands to said receiver. The authorities go to the extent of holding that even if the court should commit an error in the judgment as to the property, that the parties before the court cannot refuse to surrender the property to the receiver. In Parker *vs.* Browning, 8 Paige's Chan. (N. Y.), page 388, it is held that the receiver or party who wishes an actual delivery of the property should call upon the master to decide what property, legal or equitable, belongs to the defendant, and to which the receiver is entitled under the order of the court, is in
120 possession of the defendant or under his power *and* or control; and it is the duty of the master to direct the defendant to deliver to the receiver the actual possession of all such property or to allow him to take possession thereof. If the defendant is dissatisfied with such decision of the master, he must apply to the court to review the decision or he will be compelled by process of contempt to comply with the master's directions. Where property is in the possession of a third person who claims the right to retain it, the receiver must either proceed by suit against him, or the complainant must make him a party to his suit and apply to have the receiver take the property in his hands, so that an order may be made for its delivery, which may be enforced by process of contempt.

In Tolman *vs.* Jones, 114 Ills., p. 148, it is held: "Where a court of chancery has acquired jurisdiction over the property of an insolvent corporation and of the defendant claiming the same, this order on the defendant to assign and turn over the property claimed by him to a receiver for its preservation must be obeyed, however erroneous it may be; and the fact that such order may be too broad and require the transfer of some of the property wrongfully will not justify the defendant in refusing to obey. An error in the exercise of the jurisdiction of the court in the order to one of the defendants to assign and deliver to the receiver some property not belonging to the corporation will not render the order void as to such property and justify the defendant in refusing to obey the same. In such case the test of jurisdiction as to the subject-matter are the allegations of the bill and not the proof under it; but even if the order of the court is void in part, in requiring certain property
121 not derived from the corporation, the remedy of the defendant is to apply to the court for a modification of the order. If he fails to pursue this remedy and fails to obey the order he may be committed for a contempt of court. Where a party's refusal to make a delivery of property to a receiver, in pursuance to an order of court, is reported to the court, and he is present when the matter is considered and makes no objection to the proceedings, and is fully heard by himself and counsel in the matter, and after being ordered

by the court to execute the delivery refuses to do so, the court will be justified in making an order for his commitment for contempt, without any rule on him to show cause to the contrary. On an appeal from an order of the court committing a defendant to the county jail for refusing to obey a prior order, requiring him to assign and hand over certain property to a receiver, no error in such prior order can be considered. The only question as to such prior order that can be considered is whether the court had jurisdiction to make it. It matters not, so far as the question of condemnation is concerned, whether such order was made on sufficient proof or not." The relator in that case claimed that some of the property did not belong to the corporation and was not embraced in the order, and the court had no right to make an order requiring the same to be turned over; but it was held that the court had jurisdiction of the subject-matter and of the parties, and it had the power to make such order and to commit the party for contempt for refusing to obey the same.

In re Rosenberg, 90 Wis., 581, which was a contempt proceeding on a bill of discovery in which the party refused to answer,
122 it is held that in a *habeas corpus* proceeding only jurisdictional questions will be inquired into. The court say: "The power to determine is jurisdictional; the correctness or justness of the determination of the question is not open for consideration on a *habeas corpus* proceeding." It further holds "that the writ of *habeas corpus* will not be issued where, upon the hearing of the application therefor, it appears that the court must in the end remand the prisoner."

It will be observed, as before stated, that the relator did not claim the legal title in the notes or in the minute book, but merely an equity or a lien thereon to secure his debt. It seems that he, as an officer of the company, had transferred to himself as an individual, through the direction of some of the stockholders, the notes and minute book in question. The action of the court in ordering him to turn over said property to the receiver was by no means an adjudication as to his lien. This, if it was a genuine lien, would be preserved to him in the hands of the receiver. The effect of the order was merely to place these articles, together with all the property of the corporation, in the hands of the receiver for administration under the orders of the court. In our opinion, the court unquestionably had the power to do this, and did not exceed its jurisdiction in making said order.

As to the fund, if it be not a trust fund, in possession of relator, but a mere debt, it may be that it would not be contempt for the court to have made the order requiring this fund to be turned over to the receiver. However, that question was submitted to the court.
The record shows that proof was heard upon this question,
123 and the court below decided that this was a trust fund in the hands of the relator. If it be conceded, however, that it was a debt, due by the relator to the corporation, still, the relator was in contempt of court as to the remainder of the property—that is, the balance of the notes and the minute book—and the order was

unquestionably valid as to these, and the relator not having responded to the order of the court as to these matters, we do not feel inclined to grant him any relief. It would be his duty to show before this court, in order to obtain relief by the writ of *habeas corpus*, that he had done all within his power to comply with that portion of the order of the court which it unquestionably had a right to make.

Applicant also contends that the court exceeded its power in assessing the punishment it did against him, claiming that the punishment imposed would cause his imprisonment beyond the three days authorized by statute. It will be noted that the court, in exercising its punitive authority, only fined the relator one hundred dollars; it imposed no imprisonment as a penalty. On the relator responding to the order of the court he would have been immediately enlarged and need not go to jail for a moment. We are cited to the case of *Ex parte* Kearby, 34 S. W. Rep., but in that case we were speaking of the power of the court to punish, and stated that that power was circumscribed and limited by the statute. We were not then discussing the question of the authority of the court to enforce its orders and decrees. If, under this statute, it was given to a party to refuse to obey the orders of a court by merely submitting to a fine of one hundred dollars and three days' imprisonment and then go free, still contumacious of the order of the
124 court, the court would be rendered powerless to enforce its orders. It either follows that the court would be authorized, after having imposed a fine of one hundred dollars and three days' imprisonment, on the payment of said fine and serving three days in jail, to bring the recalcitrant party before the court and then demand if he was willing to comply with its orders, and on refusal so to do to repeat and continue to repeat the fine and costs by distinct orders, or, on the other hand, without imposing any imprisonment, on the refusal of the party to comply with the orders of the court, to remand him to the custody of the officer until he did comply. There might be some question in treating a continued contempt as a new contempt. There certainly can be no punishment at all in ordering a party *do to* that which is within the power of the court to order and which is within his ability to perform, and in such case if the party is punished at all it would appear to be self-inflicted. So far as the statute with reference to punishments for contempt is concerned, that is a mode of enforcing the rights of the court and of preserving its respect and dignity; it is a punishment. The other is not a punishment, but a specific mode of enforcing a particular duty. Conceding that the court has the power and authority to require the duty, the going to jail by the party is a self-imposed punishment and not the imposition of a punishment by the court. The order in such case is not punitive, but remedial. (See Phillips *v.* Welch, 11 Nev., 187.)

We hold that the court, in imposing the fine it did, did not exceed its pecuniary punishment, and that its order to the relator to turn over the property as commanded in the judgment was not the assessment of any imprisonment as a

125 punishment. It was a command of the court, which the court had a right to make in the exercise of its duty; and, although the court in the alternative ordered the relator into the custody of the sheriff until said order was complied with, yet the court gave the relator full opportunity of compliance. If he preferred to go to jail rather than comply, and that alternative was adopted by him, it necessarily appertains to the inherent power of the court to carry on the administration of justice to thus compel obedience to its orders. In our opinion, the court *aquo* did not exceed its power of authority in making the order it did in this case, and, the application for the writ of *habeas corpus* showing that the party is legally restrained and has no right to the writ, the motion to dismiss the same is sustained, and the relator is remanded to the custody of the sheriff of Harris county.

HENDERSON, *Judge.*

Endorsed: No. 1227. 5th assignment. *Ex parte* Thomas Tinsley. From Harris county. Application for writ of *habeas corpus* dismissed and relator remanded. Opinion by Henderson, judge; to be reported. Filed April 14th, 1897. E. P. Smith, clerk.

APRIL 14TH, 1897.

Ex Parte THOMAS TINSLEY. 1227. 5.

Habeas corpus from Harris Co.

Opinion by Henderson, Judge.

This cause came on to be heard on the motion to dismiss the writ of *habeas corpus*, and the same, being considered by the court, is sustained and the writ is dismissed. It is further ordered,
126 adjudged, and decreed by the court that the applicant, Thomas Tinsley, be remanded to the custody of the sheriff of Harris county, Texas, and that applicant pay all costs by reason of this proceeding, and that this decision be certified to the sheriff of Harris county, Texas, for his observance.

Ex Parte THOMAS TINSLEY. Number 1227. 5th Assignment.

From Harris county.

Motion for Rehearing.

Now comes Thomas Tinsley, applicant herein, and respectfully moves the court to grant him a rehearing and to set aside its judgment of April 14th, 1897, dismissing his application for writ of *habeas corpus*, and says the court erred:

1st. In holding that the court *aquo* did not exceed its power of authority in making the order it did in this case.

2nd. In holding that the application for writ of *habeas corpus* shows that your petition- is legally restrained and had no right to the writ.

3rd. In holding in effect that the court *aquo* had authority to require your petitioner to turn over the notes which he held as collateral security to the loan that he made to the cemetery company.

4th. In holding that your petitioner is not entitled to the relief, if the order of the lower court is in any respect valid, until he has complied with the order as far as he was able.

5th. In not holding that the order of the lower court, being invalid in part, was totally void.

127 6th. In not holding that the judgment and commitment are so uncertain and indefinite as to time for which applicant can be confined thereunder *are* to be void.

7th. In not holding that the court *aquo* could not imprison applicant for three days, and that the judgment is void because it imprisoned him for a longer time.

8th. In not holding that the matters and things set out in said motion and judgment do not and could not constitute a contempt.

9th. In not holding the judge disqualified and the judgment on that account void.

FISET & MILLER,
Attorneys for Applicant, Thomas Tinsley.

Endorsed: Number 1227. *Ex parte* Thomas Tinsley. Motion for rehearing. Motion 31. Filed April 26th, 1897. E. P. Smith, clerk. I hereby accept service. M. Trice.

APRIL 28TH, 1897.

Ex Parte THOMAS TINSLEY. Mo. 31. 1227. 5th.

Habeas corpus from Harris county.

Applicant submits a motion for rehearing.

MAY 12TH, 1897.

Ex Parte THOMAS TINSLEY. Motion 31. 1227. 5th.

Habeas corpus from Harris county.

This cause came on to be heard on the motion submitted by the applicant for a rehearing, and the same, being considered by the court, is overruled.

128 In the Court of Criminal Appeals of the State of Texas, at Austin, Texas.

Ex Parte THOMAS TINSLEY. No. 1227. Fifth Assignment.

From Harris county, Texas.

Know all men by these presents that we, Thomas Tinsley, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto Albert Erichson, sheriff of Harris county, Texas, in the sum of two hundred and fifty ($250) dollars, to be paid to the

said Albert Erichson, sheriff of Harris county, Texas; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of November, in the year of our Lord 1897.

Whereas the above-named Thomas Tinsley intends to sue out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the said court of criminal appeals of the State of Texas, at Austin, Texas:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Tinsley shall prosecute his writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THOMAS TINSLEY,
By FISET & MILLER,
His Attorneys of Record.
A. WHEELER.
W. H. JONES.

Approved by—
J. M. HURT,
129 *Presiding Judge of the Court of Criminal Appeals, Texas.*

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that, in my estimation, the sureties on the foregoing bond are good and sufficient for the amount thereof, and if the same were presented to me for approval I would approve the same.

Witness my hand and seal of said court this Dec. 4th, 1897.

[SEAL.] J. H. FINKS, *Clerk.*

Indorsed: No. 1227. Fifth assignment. *Ex parte* Thomas Tinsley. Writ of error bond. Filed in court of criminal appeals at Austin, Texas, February 8th, 1898. E. P. Smith, clerk.

130 In Court of Criminal Appeals, State of Texas, at Austin, Texas.

Ex Parte THOMAS TINSLEY. No. 1227. 5th Assignment.

Assignments of Error.

Now comes Thomas Tinsley and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the petitioner was restrained of his liberty and was in custody, in violation of the Constitution, of the laws, and of a treaty of the United States, and it

appears from said petition or application that the petitioner was entitled to the writ.

II.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that he was deprived of his liberty, and, if he submitted to the order of the trial court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

III.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that he was denied the equal protection of the laws, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

IV.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the petitioner was guilty of no contempt of court in refusing to deliver to the receiver the property in controversy, and that petitioner was entitled to
131 have his claim to said property tried and adjudicated in a regular suit in court, with all the rights and privileges incident thereto, before he could be required by any court to deliver up possession thereof to the receiver or any other person.

V.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the trial court had no jurisdiction nor power to determine in a contempt proceeding the right to property adversely claimed and possessed by petitioner against the receiver, and that such adjudication was *coram non judice* and without due process of law, and that the order of the court imprisoning petitioner for his failure to obey that pretended adjudication was in violation of petitioner's rights under the Constitution of the United States and under the laws thereof and under the treaty between the United States and Great Britain.

VI.

The petitioner was an alien and a citizen of Great Britain and was therefore entitled, in the proceedings instituted against him to get possession of the property in controversy, to have the controversy removed into the Federal court under the laws of the United States relating to such matters, and petitioner could not be deprived of this right and of the possession of the property by an order of the court to deliver up possession to the receiver under the guise of a contempt proceeding.

VII.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that petitioner, by virtue of the treaty between the United States and Great Britain, was entitled to the same protection, under the Federal Constitution and law, as a citizen of the United States, and that petitioner should not be deprived of his property or imprisoned except by due process
132 of law and according to the law of the land.

VIII.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of imprisonment as to the $492.52 trust money was in effect an order for imprisonment for debt, contrary to the rights guaranteed to the petitioner under the constitution of Texas.

IX.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of court imprisoning petitioner for contempt was in effect an order for perpetual imprisonment, and undertook to confine him for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and that in this respect the order deprived petitioner of the rights guaranteed to him under said treaty, the Federal Constitution, and the laws and constitution of the State of Texas.

X.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order holding petitioner in contempt of court and requiring him to deliver possession of the property in controversy was void, and that the court had no power nor jurisdiction to pass such an order in the proceedings before the court, and further that the court had no jurisdiction over the subject-matter in controversy.

XI.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the petitioner was not in fact guilty of contempt of court, and that he held no property as an officer of the cemetery company or to which the company was entitled, and it was therefore impossible for him to comply with the court's order.

FISET & MILLER,
Attorneys for Petitioner and Appellant, Thomas Tinsley,
No. 120 West 6th, Austin, Texas.

Endorsed: "No. 1227. 5th assignment. *Ex parte* Thomas Tinsley. Assignments of error. Filed in court of criminal appeals, at Austin, this 22nd day of February, 1898. E. P. Smith, clerk."

133 THE STATE OF TEXAS, }
County of Travis. }

I, E. P. Smith, clerk of the court of criminal appeals of Texas, at Austin, hereby certify that the foregoing 133 pages contain a true and correct copy of all the proceedings had in cause No. 1227, *Ex parte* Thomas Tinsley, as the same appears from the records and papers pertaining to said cause now on file in my office. I do further certify that I have attached to the transcript the original writ of error, the original citation in error and acceptance of service, and have made a certified copy of each of them, and have filed the same in my office, with the papers in said cause.

In witness whereof I hereunto set my hand and affix the seal of said court, at the city of Austin, this the 23rd day of February, A. D. 1898.

[Seal Court of Criminal Appeals of Texas.]

E. P. SMITH,
Clerk of the Court of Criminal Appeals
for the State of Texas, at Austin.

[Endorsed:] *Ex parte* Thomas Tinsley. Error to the court of criminal appeals of the State of Texas.

Endorsed on cover: Case No. 16,846. Texas court of criminal appeals. Term No., 633. Thomas Tinsley, plaintiff in error, vs. Albert Erichson, sheriff of Harris county, Texas. Filed April 12th, 1898.

Filed April 21, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THOMAS TIERNEY, *Appellant*,
vs.
ALBERT ERICKSON, *Sheriff, &c.* } No. 632.

AND

THOMAS TIERNEY, *Plaintiff in Error*,
vs.
ALBERT ERICKSON, *Sheriff, &c.* } No. 633.

MOTION TO ADVANCE.

JAMES L. BISHOP,
Counsel for Appellant and Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-22-'98

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THOMAS TINSLEY, APPELLANT,

vs.

ALBERT ERRICHSON, RESPONDENT.

Please take notice that on the return herein and on the annexed petition a motion will be made before this honorable court, at the city of Washington, on the 25th day of April, 1898, at the opening of the court or as soon thereafter as counsel can be heard, that the prayer of said petition be granted, and that the said cases be advanced upon the calendar of the court and set down for argument at some early day.

Dated April 20th, 1898.

JAMES L. BISHOP,
Counsel for Thomas Tinsley, Plaintiff in Error and Appellant.

To PRESLEY K. EWING, Esq.,
Counsel for Defendant in Error and Appellee.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1897.

THOMAS TINSLEY, *Appellant*,
vs.
ALBERT ERRICHSON, *Respondent*.

Now comes Thomas Tinsley and moves the court to advance the above-entitled causes to such early hearing as it may deem proper, and for reason therefor states as follows:

One of these actions is a writ of error from the court of criminal appeals of Texas from a final determination in a proceeding upon *habeas corpus*, brought by your petitioner before that court, in which the petition was dismissed and your petitioner remanded to the custody of the defendant.

Your petitioner further shows that your petitioner is now confined in the county jail at the city of Houston, in the State of Texas, upon an order of commitment made by the district court of the State of Texas, Harris county, in an action brought by Octavius C. Drew and others against The Houston Cemetery Company and others, No. 18969, for an alleged contempt of court in the refusal by your petitioner to deliver to one William Christian, a receiver of the Houston Cemetery Company, appointed by the said court in said action, by an order made and dated the 23d day of April, 1896, certain property mentioned in the said order of commitment. By the said order adjudging your petitioner guilty of said contempt it was directed that your petitioner pay to the sheriff of Harris county, Texas, a fine of $100 as punishment for the contempt aforesaid, and that he turn over to William Christian, as receiver of the property of said company as aforesaid, the property therein described, and that in default of immediate payment of the fine and delivery of the property so directed to be turned over to the receiver that your petitioner be committed to the common

jail of Harris county and imprisoned therein until full compliance with the said order or until the further order of said court, and that a commitment issue to carry said judgment into effect.

Your petitioner claims that the said order was void for the reason that said William Christian was appointed receiver of the property belonging to and in the possession of the said Houston Cemetery Company and not of the property belonging to or in the possession of your petitioner, and that the property specified in the said order of commitment was not at the time the said receiver was appointed the property of the said Houston Cemetery Company or in the possession of the said company or of any officer thereof, and that the said district court of Texas had no jurisdiction in a proceeding to punish your petitioner for contempt for an alleged disobedience of said order to adjudge and determine the title to the said property or the right to the possession thereof, and that the said order in so far as it attempted to determine in said proceeding the right to the possession or to the ownership of the said property was void, and that in so far as it directed your petitioner to turn over to said receiver property which did not belong to the said corporation and to which it did not have the right of possession, but which belonged to and was in the possession of your petitioner, the same was void and of no effect, and that no valid order or judgment could be made against your petitioner for a disobedience thereof.

Your petitioner further shows that the said order of commitment was also illegal and void, and that the court was without jurisdiction to make the same, for the reason that the court after fining your petitioner $100 as a punishment for the said alleged offence of contempt further directed that your petitioner should be confined in the said common jail not only until after the payment of the said fine, but until he should deliver the property specified in the said order of commitment.

And your petitioner further shows that at the time of the application for the said writ of *habeas corpus* your petitioner had been imprisoned for a period in excess of three days, and that it is expressly provided by the statutes of the State of Texas that imprisonment for contempt shall not exceed a period of more than three days.

Your petitioner further shows that the second of the above-entitled actions is an appeal to this court from an order made by the United States circuit court for the eastern district of Texas dismissing a writ of *habeas corpus* theretofore granted by the judge of said court, upon the return to which writ the order of commitment and proceedings above set forth were presented to said judge, and that the said judge thereupon dismissed the said writ of *habeas corpus*, notwithstanding that the said return showed, as your petitioner is advised and believes, that the said commitment was wholly void and of no effect.

Your petitioner further says that he was committed to jail February 6, 1897, and has been confined in jail constantly and continuously since that time, a period now upwards of fourteen months, except for about four days when he was released on bail and other brief periods when he has been in attendance at court.

Your petitioner urgently prays that the appeal herein may be brought to a hearing before the court adjourns for the summer months, for the reason that his imprisonment has not only been protracted, but is of a rigorous and exhausting character. During the first two or three weeks of his confinement he was allowed to go to a restaurant for his meals, but since that time he has been closely confined in a room in the jail and in a steel cell in said room, which prevents him from approaching from within five feet of any window. There have been placed in the said cage with him persons convicted of felonies and afflicted with loathsome diseases, and also a person who was adjudged insane and was awaiting removal to an insane asylum, and he has been

forced within a small space to keep constant company with these persons.

Your petitioner is a man of education and of refinement and of wealth, and has always been in easy and comfortable circumstances and was never before imprisoned or accustomed to such company or surroundings. The room where he is confined is in that part of the building where he is cut off from the prevailing summer breezes, which temper and render bearable the excessive summer heat of the climate; without which the heat is almost unbearable. The windows to his room have no blinds, curtains, or other means of keeping out or moderating the fierce heat of the southern sun, which shines during the hottest part of the day.

And your petitioner is not allowed outside of said cage, not even to walk around outside between the cage and the walls, and he has no opportunity to take exercise which is necessary to his health. Your petitioner is over fifty-one years of age, and in his early life, when he lived in England, was accustomed to spend his winters, on account of consumptive tendencies, in Italy and France, and it has always been necessary for him to have plenty of fresh air and take exercise and guard against exposure to preserve his health. He is not a robust man, and the cruel and unusual mode of confinement for so long a time has, as he believes, seriously and permanently impaired his health, and that if he has to remain in jail during the coming summer, which in this climate is very oppressive and enervating and which lasts until October, his health will in all probability be destroyed and his life greatly endangered.

Your petitioner is advised and believes that his imprisonment is illegal, and that he is being deprived of his liberty in violation of the rights guaranteed to him by the Constitution of the United States and of the State of Texas and of the treaties of the United States with Great Britain, of which country he is a subject. His refusal to deliver the property described in the commitment and the proceedings which he

has since taken to resist the enforcement of said order have not been intended to prevent the administration of the law or the proper exercise of judicial powers, but are the result of the honest conviction on the part of your petitioner that the said proceedings are extrajudicial, and that in resisting the same your petitioner has and is performing a duty which he feels to be imposed upon him not to submit to arbitrary and unjust action. He has accorded (offered) to said receiver the privilege of inspecting said property at all times, but refuses to surrender his title and right of possession thereof.

Wherefore your petitioner prays that these causes may be advanced to an early hearing or that he be admitted to bail to await the further orders of this court.

JAMES L. BISHOP,
Counsel for Petitioner.

STATE OF TEXAS, }
City of Houston, County of Harris, } *ss:*

Thomas Tinsley, being duly sworn, says that he is the petitioner above named and has read the foregoing petition and knows the contents thereof, and that the same is true according to the best of his knowledge, information, and belief.

THOMAS TINSLEY.

Sworn to before me this 16th day of April, 1898.

[SEAL.] DAVID HANNAH,
Notary Public in and for Harris County, Texas.

(Endorsed:) Cases Nos. 16,845 & 16,846. Supreme Court U. S., October term, 1897. Term Nos., 632 & 633. Thomas Tinsley, appellant and P. E., *vs.* Albert Erichson, sheriff, &c. Motion to advance. Filed April 21, 1898.

No. 632 & 633.

Brief of Bishop for Appt & Pl

Filed May 5, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

THOMAS TIERNEY, *Appellant*,
vs.
ALBERT ERICHSON, *Sheriff, &c.* } No. 632.

AND

THOMAS TIERNEY, *Plaintiff in Error*,
vs.
ALBERT ERICHSON, *Sheriff, &c.* } No. 633.

BRIEF FOR APPELLANT AND PLAINTIFF IN ERROR.

JAMES L. BISHOP,

[redacted]

Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1897.

THOMAS TINSLEY,
Appellant,

vs.

ALBERT ERICHSON, Sheriff, &c.

No. 632.

THOMAS TINSLEY,
Plaintiff in Error,

vs.

ALBERT ERICHSON, Sheriff, &c.

No. 633.

BRIEF FOR APPELLANT AND PLAINTIFF IN ERROR.

Statement of the Case.

The case first above entitled is an appeal from an order of the United States Circuit Court for the Eastern District of Texas, dismissing a writ of *habeas corpus*, and remanding the prisoner to the custody of Albert Erichson, Sheriff of Harris County, Texas.

The second of the above-entitled cases is a writ of error to the Court of Criminal Appeals of Texas, bringing up the final judgment in a proceeding upon *habeas corpus* by which the petition was dismissed and the prisoner remanded to the custody of the same Sheriff.

Each of these proceedings in *habeas corpus* was brought

to determine the validity of the imprisonment of Thomas Tinsley under a commitment issued to the Sheriff of Harris County upon a judgment or order in a proceeding in the District Court of Texas to punish him for an alleged contempt of Court and to compel obedience to an order made by that Court in an action brought by Octavius C. Drew and others, against the Houston Cemetery Company and others, made and dated on the 23d day of April, 1896.

It appears (Case 633, p. 3; case 632, p. 1) that on the date above named Drew and others filed a petition in the District Court of Texas for the 11th Judicial District asking that a Receiver be appointed of the Houston Cemetery Company, which petition shows that the plaintiffs therein sued for the benefit of all the lot owners in said Cemetery, and that the principal purpose of the receivership was to complete a certain bridge in the Cemetery and repair the Cemetery and improve its grounds; it appears also that Thomas Tinsley was the president of the Cemetery Company, and that he with others were made parties defendant in that action and that no Receiver was asked for of his individual property (Case 632, p. 2), and that he contested the appointment of the Receiver. On the same day after notice and argument an order was made appointing William Christian, Receiver (Case 633, p. 13; case 632, p. 18), "of all and singular the property, assets, "rights and franchises of the defendant the Houston "Cemetery Company of every description including all "money, claims in actions, credits, bonds, stocks, lease-"hold interests or operating contracts and other assets of "every kind, and all other property—real, personal or "mixed—*held or possessed by said Company*, and also of "the trust fund described in the plaintiff's petition as "purporting to be loaned to said Company, and secured "by a mortgage deed of trust together with the ac-"cretions thereto since accruing or to accrue; to have and "to hold the same as an officer of and under the orders and "directions of this Court."

The order authorizes and directs the Receiver to take immediate possession of the property above described and

to carry on and to continue the business of the company, and it further provides as follows:

"Each and every of the officers, directors, agents and "employees of the said Houston Cemetery Company are "hereby required and commanded forthwith upon the de- "mand of the said Receiver to turn over and deliver to "said Receiver any books, papers, moneys or deeds or "property or vouchers for the *property under their con- "trol to which such corporation is entitled or which they "hold or control as such officers, directors, agents or "employees.*"

On the 2d of February, 1897, the Receiver demanded of Mr. Tinsley that he turn over certain notes and the minute book and $492.52 in cash (Case 633, p. 3; Case 632, p. 2), and Mr. Tinsley declined to turn over or surrender any of said property to the Receiver "on the ground that "he had a good and perfect right and title thereto and to "keep and possess so much thereof as was in his posses- "sion." Thereupon the Receiver instituted a proceeding to punish him for contempt, and made and served a petition for that purpose (Case 633, pp. 29 to 34; Case 632, pp. 20 to 23), reciting his appointment as Receiver of the property belonging to the Houston Cemetery Company and the direction to the officers, including Mr. Tinsley, the president, to turn over and deliver to him the books, papers, moneys, deeds and other property under their control, to which the company was entitled or which they held or controlled as such officers; that the said company was entitled to moneys belonging to the company then on hand amounting to $3,104.50; to notes and bills receivable, amounting to $1,440.50; to a certain book known as "the Minute Book," also to a certain book known as the "Bank Deposit Book," and also the portion of the trust fund to which the company was entitled is covered by the note of the company amounting to $8,285.51, "and also that portion of said "trust fund which accrued for and during the years 1894 "and 1895, amounting to the sum of $492.52, and also the "sum of $695.00 which arose from the assessments in per- "petuity belonging to said trust fund, but not placed to "its credit as shown by the books of said company"

(Case 633, p. 32; Case 632, page 22); that he had made demand of Mr. Tinsley that he should turn over and deliver to him the moneys, notes, books and funds above specified, and that Tinsley had refused to comply.

Upon this petition an order was made requiring Tinsley to show cause why he should not be punished for contempt in disobeying the decree of April 23rd, 1896, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by him therewith in the particulars of disobedience and for the payment of the costs of the proceeding (Case 633, p. 33; Case 632, page 24). Tinsley filed an answer to this application setting up certain facts in reference to the first item of $3,104.50 (Case 633, p. 35; Case 632, page 25), which it is not necessary to consider inasmuch as his allegations in reference to this item were sustained. The same is to be said of the items relating to the "Bank Deposit Book," the fund of $695 of assessments in perpetuity and the note for $8,285.51.

As to the remaining items, to wit, the notes of the company, its minute book and $492.52 of its trust fund, the answer asserted that as to the latter item one Wisby, the secretary and treasurer of the company, had misappropriated the fund and converted it to his own use, and that Tinsley had assumed the liability to pay the same, and that as to the other items under date of April 15th, 1896, the Company had given Mr. Tinsley its note for $1,500 as evidence of an indebtedness due to him of $500 for dividends which were due to him and unpaid, and of $1,000 cash advanced to the company to meet its expenses for attorneys' fees and otherwise, and that at a meeting of the Board of Directors held on the 15th of April, 1896, at which a quorum was present, a resolution was passed authorizing the execution of the company's note for $1,500 to the order of Charles Tinsley who endorsed it over to Thomas Tinsley to cover the aforesaid indebtedness and authorizing the delivery to Tinsley as collateral security of the minute book and $1,342.50 of the company's notes, and that he was entitled to hold the collateral security until the payment of this note. The answer also set up that

Tinsley had invested the $492.52 of the trust fund in vendors lien notes and had paid $7.70 to make the investment, and that he was willing to deliver the said notes upon being repaid that sum. The answer was verified February 6th, 1897, and upon the same day the Receiver filed a demurrer, and also an unverified traverse (Case 633, p. 37; Case 632, p. 28), and thereupon the Court on the same day having heard evidence both oral and written in support of the issues made an order (Case 633, p. 25; Case 632, p. 7), adjudging Mr. Tinsley guilty of a contempt in having disobeyed the Court's order of April 23d, 1896, appointing Mr. Christian Receiver of the property of the Cemetery Company, by failing and refusing to turn over to the Receiver (1) the notes specified in a schedule attached to the order amounting on their face to $1,440.50 (2) the book known as the "Minute Book;" (3) the portion of the trust fund which accrued in the years 1894 and 1895 amounting to $492.52; and the Court further adjudged and directed that he pay to the Sheriff of Harris County, Texas,

"a fine of $100 as a punishment for the contempt afore-
"said, and that he forthwith turn over and deliver to said
"William Christian as Receiver aforesaid the said notes,
"minute book and trust fund of $492.52 as an aid to the en-
"forcement of the aforesaid order of April 23d, 1896, and
"that in default of immediate payment of said fine and of
"the delivery and turning over forthwith to said William
"Christian, as Receiver aforesaid, of said notes, minute
"book and trust fund of $492.52, he, the said contemnor,
"Thomas Tinsley, be imprisoned in the common jail of
"Harris County, Texas, until he shall pay the said fine of
"$100 as herein directed and until he shall turn over and
"deliver to said William Christian as aforesaid * * *
"the said notes, minute book and trust fund of $492.52
"and until he shall pay to the Sheriff aforesaid his costs
"for executing the commitment herein or until he shall
"be discharged by the further order of this Court,"

and the Clerk was directed to issue a commitment accordingly (Case, 633, p. 26; Case, 632, p. 8).

It will be observed that the order directed the immediate issuance of the commitment without previous service of the order or decree or demand for compliance, and it will be further observed that the decree varied materially

from the petition upon which it was based, and that as to the larger part of the property to the possession of which it was alleged the Receiver was entitled, and for a failure to deliver which Tinsley was charged to have been guilty of an offence the charge failed, and until the decree was made and served it was impossible for him to know the items which the Court would order him to deliver.

Upon the commitment so issued Tinsley was imprisoned in the county jail at Houston. In March, 1897, he presented a petition in habeas corpus to the Judge who had made the order of commitment, and under date of March 17th, 1897, he declined to issue the writ (Case 633, p. 17). A similar application was made on March 22d, to one of the Judges of the Criminal District Court at Galveston, and was declined (Case 633, p. 17). On the 2d of April, a writ of habeas corpus was issued by one of the Judges of the Court of Criminal Appeals, and came on for hearing, and after argument the writ was dismissed and the prisoner was remanded to the custody of the Sheriff (Case 633, p. 73). An application for a re-hearing was denied (Case 633, p. 74). The petition for the writ will be found at page 2 and the respondent's return at page 21. The petition sets out the matters which have been already stated, and further alleges that applicant never had in his possession certain of the notes which he was required to deliver to the Sheriff (specifying them page 4):

"That the remainder of the notes he held as a private "individual as collateral to the $1,500 note for money "loaned by him to the company, and that he had a per- "fect legal right to the possession thereof. That the "minute book was likewise pledged to him as collateral "security for said loan and that he had a legal right "thereto and to its possession, and that each of these "articles were his private property and not the property "of the corporation; that he is amply solvent and that "the Receiver has a full and complete remedy at law for "the recovery of the property, in case he is legally ad- "judged entitled thereto, but notwithstanding these "facts, he was, peremptorily ordered to turn over the "funds and the books to the Receiver, and that as to the "further sum of $492.52 he had assumed this obligation

"as the debt of Wisby, and that he owed it to the com-
"pany as an individual and private person, and not as an
"officer of the company, and that he was solvent and able
"to respond in case the Receiver should obtain judgment
"against him."

The petition also contains the following statement:

"This applicant further states that his claim to all the
"matters and things above set out was and is made in
"good faith, and that he has the right and does assert the
"right thereto until deprived thereof by due course of
"law, and he says that the proceedings on said motion
"and said judgment is not due process of law, and that
"he ought not and cannot by such proceedings be im-
"prisoned or compelled to turn over said property and
"things for that thereby he is deprived of trial by due
"course of law, and that said judgment and commitment
"are therefore void and his detention thereunder illegal"
(Case, 633, p 5; Case, 632, p. 5).

He further says in his petition that the Court on the hearing adjudged him guilty of contempt and undertook by its judgment to impose upon him a fine of $100 and to imprison him in jail until he should comply with the judgment, and he alleges that the judgment is void as well as the commitment because (1) the Judge was disqualified by affinity and consanguinity. (2) Because the judgment and commitment were uncertain and indefinite and did not limit the time under which he could be confined and that since he is unable to deliver certain of the notes the order amounts to the imprisonment for the term of his natural life. (3) Because the statutes of the State provide that the District Court shall not have the power to imprison any person for a period any longer than three days for a contempt, whereas said judgment undertakes to confine this applicant for a longer period than three days, and as a matter of fact he has already been confined thereunder for thirty-eight days. (4) Because the matters set up in the motion and judgment did not and could not constitute a contempt.

The return of the Sheriff. (Case, 633, p. 21; Case, 632, p. 32) sets out the proceedings above recited annexing the writ of commitment, the order under

which it was issued, the petition in the contempt proceeding, the answer thereto and the order appointing the Receiver. All the proceedings which are above narrated were before the Court upon the return of the Sheriff. Upon the hearing no additional testimony was taken. The controversy was decided upon the petition and the return.

Upon remanding the prisoner the Court delivered an opinion (Case, 633, pp. 63, 73).

Assignment of errors in the State Court proceeding.

The following is the assignment of errors in the State Court relied upon in this Court (Case 633, p. 75, *et seq.*):

I.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was restrained of his liberty and was in custody, in violation of the Constitution of the laws, and of a treaty of the United States, and it appears from said petition or application that the petitioner was entitled to the writ.

II.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that he was deprived of his liberty, and, if he submitted to the order of the trial Court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

III.

The matters and things set out in petitioner's application or petition for a writ of habeas corpus showed that he was denied the equal protection of the laws, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

IV.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was guilty of no contempt of Court in refusing to deliver to the Receiver the property in controversy, and that petitioner was entitled to have his claim to said property tried and adjudicated in a regular suit in Court, with all the rights and privileges incident thereto, before he could be required by any Court to deliver up possession thereof to the Receiver or any other person.

V.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the trial Court had no jurisdiction nor power to determine in a contempt proceeding the right to property adversely claimed and possessed by petitioner against the Receiver, and that such adjudication was *coram non judice* and without due process of law, and that the order of the Court imprisoning petitioner for his failure to obey that pretended adjudication was in violation of petitioner's rights under the Constitution of the United States and under the laws thereof and under the treaty between the United States and Great Britain.

VI.

The petitioner was an alien and a citizen of Great Britain, and was, therefore, entitled, in the proceedings instituted against him to get possession of the property in controversy, to have the controversy removed into the Federal Court under the laws of the United States relating to such matters, and petitioner could not be deprived of this right and of the possession of the property by an order of the Court to deliver up possession to the Receiver under the guise of a contempt proceeding.

VII.

The matters and things set out in petitioner's applica-

tion or petition for writ of habeas corpus showed that petitioner by virtue of the treaty between the United States and Great Britain, was entitled to the same protection, under the Federal Constitution and law, as a citizen of the United States, and that petitioner should not be deprived of his property or imprisoned except by due process of law and according to the law of the land.

VIII.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the order of imprisonment as to the $492.52 trust money was in effect an order for imprisonment for debt, contrary to the rights guaranteed to the petitioner under the constitution of Texas.

IX.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the order of Court imprisoning petitioner for contempt was, in effect, an order for perpetual imprisonment, and undertook to confine him for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and that in this respect the order deprived petitioner of the rights guaranteed to him under said treaty, the Federal Constitution, and the laws and constitution of the State of Texas.

X.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the order holding petitioner in contempt of Court and requiring him to deliver possession of the property in controversy was void, and that the Court had no power nor jurisdiction to pass such an order in the proceedings before the Court, and further that the Court had no jurisdiction over the subject-matter in controversy.

XI.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was not, in fact, guilty of contempt of Court, and that he held no property as an officer of the cemetery company or to which the company was entitled, and it was therefore impossible for him to comply with the Court's order.

In May, 1897, a writ of habeas corpus was granted by Judge Bryant in the United States Circuit Court at Galveston, upon a petition of Tinsley, setting out somewhat more fully and in detail the proceedings as stated in the petition in the State Court (Case 632, p. 1, *et seq.*) An amended petition was filed on the 7th of June, 1897 (p. 12).

In this petition it is stated with regard to the so-called trust fund of $492.50 that this sum had been misappropriated by Wisby, and that the petitioner had assumed the liability and had invested it in vendors' liens notes as required by the charter of the company, and that in order to make the investment he had put in the additional sum of $7.70 of his own money, and that he tendered the notes to the Receiver upon payment of this sum, but that the Receiver declined to make this small payment and refused to accept the notes as an investment of the fund, but demanded the cash (Case, 632, p. 14).

To this application the Sheriff filed a return which was simply an exception to the sufficiency of the facts stated in the petition and which accordingly conceded all the facts therein stated (p. 32). A hearing was had before the United States Circuit Court for the Eastern District of Texas and the petition was dismissed and the prisoner remanded (p. 33).

Assignment of errors in the United States Circuit Court proceeding.

The following is the assignment of errors in the United

States Circuit Court relied upon in this Court (case 632, p. 34, *et seq*).

I.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was restrained of his liberty and was in custody in violation of the Constitution, of the laws, and of a treaty of the United States, and it appears from said petition or application that the petitioner was entitled to the writ.

II.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that he was deprived of his liberty and, if he submitted to the order of the trial Court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

III.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that he was denied the equal protection of the laws, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

IV.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was guilty of no contempt of Court in refusing to deliver to the Receiver the property in controversy, and that petitioner was entitled to have his claim to said property tried and adjudicated in a regular suit in Court, with all the rights and privileges incident thereto, before he could be required by any Court to deliver up possession thereof to the Receiver of any other person.

V.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the trial Court had no jurisdiction or power to determine in a contempt proceeding the right to property, adversely claimed and possessed by petitioner against the Receiver, and that such adjudication was *coram non judice* and without due process of law, and that the order of the Court imprisoning petitioner for his failure to obey that pretended adjudication was in violation of petitioner's rights under the Constitution of the United States and under the laws thereof, and under the treaty between the United States and Great Britain.

VI.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was an alien and a citizen of Great Britain, and was, therefore, entitled in the proceedings instituted against him to get possession of the property in controversy to have the controversy removed into the Federal Court under the laws of the United States relating to such matters, and that petitioner could not be deprived of this right and of the possession of the property by an order of the Court to deliver up possession to the Receiver under the guise of a contempt proceeding.

VII.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that petitioner, by virtue of the treaty between the United States and Great Britain, was entitled to the same protection under the Federal Constitution and law as a citizen of the United States, and that petitioner should not be deprived of his property or imprisoned except by due process of law and according to the law of the land.

VIII.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of imprisonment as to the $492.52 trust money was in effect an order for imprisonment for debt, contrary to the rights guaranteed to the petitioner under the constitution of Texas.

IX.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of Court imprisoning petitioner for contempt was in effect an order for perpetual imprisonment, and undertook to confine him for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and that in this respect the order deprived petitioner of the rights guaranteed to him under said treaty, the Federal Constitution, and the laws and constitution of the State of Texas.

X.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order holding petitioner in contempt of Court and requiring him to deliver possession of the property in controversy was void, and that the Court had no power nor jurisdiction to pass such an order in the proceedings before the Court, and further that the Court had no jurisdiction over the subject matter in controversy.

XI.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that petitioner was not in fact guilty of any contempt of Court, and that he held no property as an officer of the Cemetery Company, or to which the company was entitled, and it was therefore impossible for him to comply with the Court's order.

POINTS.

I.

The commitment and the order on which it was made were void.

I.—Distinct and imcompatible proceedings were blended in one judgment. The proceeding to punish Tinsley for a contempt in having disobeyed the order was in the nature of a criminal proceeding under the Texas statute instituted really on behalf of the people ending in a fine to be paid to the Sheriff and to be collected for the use of the county. The proceeding adjudging that Tinsley deliver certain specified property to the Receiver, and that he stand committed until delivery, was a civil remedy instituted by the Receiver ending in a direction that the property be delivered to the Receiver, and in a commitment by way of execution to enforce the judgment. The former was a conviction and sentence. The latter a judgment and execution. They differ as to parties, subject matter and adjudication. To blend them in one pleading, one trial and one judgment was to disregard distinctions vital to the due administration of law. The distinction between these remedies is intrinsic and evident.

In re Chiles, 22 Wall., 157.
People *vs.* Court of Oyer & Term., 101 N. Y., 245.
Thompson *vs.* R. R. Co., 487 Equity, 105.
Rapalje on Contempt, Sec. 21.

It is recognized in the opinion in the Court below (Case 633, p. 72), and requires no further comment for its elucidation.

Because these remedies are essentially different they cannot be blended in one. "Civil and criminal proceed-
" ings can never thus be united and blended at least
" without the sanction of some positive statute. Hence
" the final order in contempt proceedings must be one
" thing or the other; it must impose criminal punishment

" for the misconduct or enforce the civil remedy by award-
" ing indemnity. It cannot do both."

Matter of Pierce, 44 Wisc., 411–422.

II.—If, however, we regard each of these proceedings as separately before the Court and examine each of them as a separate proceeding regarding so much of the judgment as is applicable to one as having been made in that proceeding, and so much of the judgment as is applicable to the other as having been made in it, we shall find that each of the proceedings standing independently is void.

III.—Regarding the order as made in the proceeding as a civil remedy directing the appellant to deliver the property specified to the Receiver, or in default of delivery that he be committed until he make delivery, it was void for the reason that the Court had no authority in a proceeding to punish for contempt to determine the right of possession of property claimed adversely to the Receiver or give judgment for the payment of a debt.

(1.) The order appointing the Receiver of the property of the Houston Cemetery Company did not specify particular property. It extended generally to property held or possessed by the company. The officers of the company were required to deliver to the Receiver the property under their control "to which such corporation is entitled or " which they hold or control as such officers, directors, " agents or employees." The order did not extend to the property held or possessed by appellant, nor did it attempt to take this or any other particular property which was the subject of controversy into the possession of the Receiver to abide the result of any controversy respecting it made by appellant or against him. The object of the litigation was the preservation of the property of the company, not the ascertainment of any controverted rights touching the property claimed by appellant. Hence although appellant was a party to the action his presence gave the Court no jurisdiction over property in his posses-

sion and claimed by him. He was in the situation of a stranger having in his possession property which the corporation claimed, and which he also claimed. A proceeding to punish him for contempt was not a lawful judicial process by which to determine his right of possession or title to such property. The Court was, therefore, without jurisdiction to render a judgment determining such right of possession or title.

This has been repeatedly and uniformly held.

Ex Parte Hollis, 59 Cal., 405.
Parker *vs.* Browning, 8 Paige, 388.
Havemeyer *vs.* Superior Court, 84 Cal., 385.
Davis *vs.* Graves, 16 Wall., 218.
Baldwin *vs.* Wayne Co. Circuit Judge, 101 Mich., 119.
State *vs.* Ball, 5 Wash., 387.
Matter of Muehfeld, 16 App. Div. (N. Y.), 401.
Ex Parte Grace, 79 Am. Dec., 534, 539.
State *vs.* Start, 74 Am. Dec., 278.
Ex Parte Hardee, 68 Ala., 303.
Beach on Receivers, §§ 216, 247.
High on Receivers, § 149.

In Ex Parte Hollis, *supra*, the principle is clearly and forcibly stated as follows :

"The question, therefore arises whether a superior "Court has authority to adjudge a party guilty of con- "tempt and to fine and imprison him for not turning "over to a Receiver in insolvency moneys and effects, "part of which he claims adversely to the insolvent "debtor ; and the other part is also claimed adversely "by a corporation with which he is not connected as an "executive officer or director. We think such a power "cannot be exercised over a party, unless he has col- "lected and holds the money and effects as Trustee for "the estate of the insolvent debtor, and the Court has "jurisdiction over him as an officer of the Court, or as "a party to the proceedings. It is not claimed that the "Real Estate and Building Association was an officer of "the Court, or a party to the proceedings in insolvency, "nor was the petitioner. Verifying the answer of the "insolvent debtor did not make him a party. Process

"against the corporation brought the corporation alone "into Court; being in Court it verified and filed its "pleadings according to law. It was the only party to "the record. Neither the president, secretary, the indi-"vidual directors, nor stockholders were parties to the "proceedings. The petitioner then was not an officer of "the Court nor a party to the proceedings in insolvency. "He claimed the property under title adverse to all the "world. As an adverse claimant he was not before the "Court. The Court had no control or jurisdiction over "him or over his property. 'And it could not, "by a mere order to show cause why he should "not be punished for contempt of Court make "him, as an adverse claimant, a party to the proceedings "and adjudge his right to the property in a summary "way. * * * If his title is claimed to be invalid as "fraudulent and void, he is entitled to be heard accord-"ing to the forms of law. Proceedings to punish him for "contempt for not delivering it up, without a trial accord-"ing to law, to another who claims it, are not the appro-"priate proceedings for the trial of issue of title' " (See page 413, *et seq.*).

And in Parker *vs.* Browning, 8 Paige, 338, 391, Chancellor WALWORTH stated the rule as follows:

"If the property is in the possession of a third person "who claims the right to retain it, the Receiver must "either proceed by suit in the ordinary way to try his "right to it, or the complainant should make such third "person a party to the suit and apply to have the Re-"ceivership extended to the property in his hands; so "that an order for the delivery of the property may be "made which will be binding upon him and which may "be enforced by process of contempt if it is not obeyed."

The same principle is stated in almost identical language in State against Ball, 5 Wash., 387.

The precise question was passed upon in the matter of Muehlfeld, 16 App. Div. (N. Y.), 401. In a proceeding for the voluntary dissolution of a corporation a Receiver was appointed. The corporation had made a general assignment for the benefit of creditors and the assignee was in possession of certain property. The Receiver applied for an order directing the assignee to deliver the property to him and the order was made. From that order an ap-

peal was taken and the order was reversed. The Court said:

"The proceeding was, therefore, one not simply to de-
"termine the right of possession of the property, the title
"to which was not disputed, but to decide as to the
"ultimate right of the property of the company between
"two persons each of whom presented a paper title.
"The serious question, therefore, was the question of
"property. The Receiver sought in this summary way to
"take away from the assignee the property of which he
"claimed to be the owner. We do not think it can be
"done in this way."

The authorities are summarized in Beach on Receivers (§ 258) as follows:

"It is also clearly well settled that in a proceed-
"ing to punish for contempt of court, the question
"of the title to property cannot rise or be adjudicated.
* * * It, (the Court) will not directly or indirectly assume
"to consider or decide to whom the property belongs or to
"decide that the Receiver has or has not the right of pos-
"session in and to it."

The process for contempt to enforce the summary delivery of property in such case serves a purpose similar to that of a writ of assistance or sequestration and such a writ will not be issued to take property from the possession of a stranger claiming title at the instance of a Receiver.

Thus Mr. High says (Receivers, Sec. 149): "While a
"court of equity will in a proper case freely extend its aid
"by a writ of assistance to enable its Receiver to obtain
"possession of property to which he is entitled, it will not
"thus interfere upon a mere motion as against the possession
"of a stranger to the action claiming a superior title under
"which he holds possession, but will leave the disputed
"question of title to be determined by an action for that
"purpose." Citing Gelpke *vs.* M. & H. R. Co., 11 Wisc. 454, where DIXON, C. J., said: "I know of no case where
"it has been adjudged that the possession of a stranger
"who sets up a superior title in pursuance of which he
"claimed to have entered and to hold might be thus dis-
"turbed. In such cases it has been the uniform rule to
"leave the plaintiffs to their remedies by action."

An illustration of the application of this principle is found in the administration of the former bankrupt law.

In re Marter, 12 N. B. R., 185, it appeared that Marter was adjudged bankrupt and an injunction was issued restraining him and one Bechtel from disposing of the property of the bankrupt. Marter had previous to the adjudication made a general assignment to Bechtel. Bechtel proceeded to make sale of the goods so assigned, and upon a proceeding to punish him for contempt it was held that since the injunction restrained only a sale of property belonging to the bankrupt, it was not in the power of the Court to proceed in a summary manner upon proceedings for contempt to determine the ownership of the property. This rule was based upon the decisions in this Court in Smith *vs.* Mason, 14 Wall, 419, and Marshall *vs.* Knox, 16 Wall., 551. The latter case is instructive also upon the claim made in the opinion in the Court below (p. 61) that, since the plaintiff in error claimed a lien only, he would be deprived of no property right, should he be compelled to deliver possession to the Receiver. In response to a similar argument, Mr. Justice BRADLEY, speaking for the Court, said (16 Wall, 557): "The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing as much as the subject of litigation as the thing itself." (In this connection see also Ham *vs.* Live Stock Co. 35 S. W. R., 427.)

Another application of the same principle is found in the administration of the statutes which exist in many States regarding proceedings supplementary to execution. Under these statutes the Courts have power to appoint a Receiver of the property of a judgment debtor. The uniform rule is that where a Receiver has thus been appointed he cannot compel the delivery of property in the possession of third persons, who claim title or right to possession adverse to the judgment debtor by proceedings for contempt.

Rodman *vs.* Henry, 17 N. Y., 482.

Barnard *vs.* Kobbe, 54 N. Y., 516.
West Side Bank *vs.* Pugsley, 47 N. Y., 368.
Krone *vs.* Klotz, 3 App. Div., 587.
In re Havlick, 45 Neb., 747.
Edgerton *vs.* Hanna, 11 Ohio State, 323.

(2.) The principle for which we contend seems to have been conceded in the opinion in the Court below, but its application was denied for the reason that it was claimed that Mr. Tinsley was a party to the action in which the Receiver was appointed and the case of Tolman *vs.* Jones, 114 Ill., 148, was relied upon as authority that in such a case a party could not refuse delivery to the Receiver upon the claim of his own right of possession. That case, however, is clearly distinguishable upon its facts. There certain of the defendants were directors and officers of a corporation in which the plaintiffs were stockholders. They were also members of a limited partnership, of which the plaintiffs were the special partners. The bill alleged that these defendants conspiring with Tolman also a defendant to cheat the plaintiffs had made a fictitious note in favor of Tolman signed by themselves individually in the firm name under which execution had been levied upon property of the corporation, and that they had made a fraudulent bill of sale to Tolman of property which rightfully belonged to the corporation, but which they had wrongfully converted to their own use. A Receiver was appointed and an order was made requiring Tolman to deliver to the Receiver the property transferred to him and received by him under said bill of sale and all the property of defendants which had been delivered to him under said bill of sale or otherwise. The Master required him to execute a formal assignment to that effect. This he declined to do. The contention on the proceedings to punish for contempt was that the order was too broad. The subject matter of the suit in that case included the property transferred by the bill of sale. It was that property in the hands of the defendant Tolman, which the Court directed the Receiver to take. The Receivership by its terms therefore extended to Tolman and to the property claimed by him, but here the order does not sequestrate the property of Tinsley, or

property alleged to have been delivered to him or in his possession, nor is that property the subject of the controversy. The Receivership extends only to property belonging to and in possession of the corporation.

The mere presence of a party does not give the Court jurisdiction of his person or of his property, except as to the matter or thing which is the subject of the action. The validity of the pledge to Tinsley and his right to the possession thereunder were not the subject of the action in which the Receiver was appointed. They could not have been since the pledge was not made until after that action was commenced. He was made a party defendant in an action the subject matter of which related to the maintenance of the cemetery, the construction of a certain bridge and the maintenance and improvement of the grounds, drives and walks of the cemetery, and generally to carry on the business of the company (Case, 632, p. 13). So far as any other subject was concerned, Tinsley was present merely as a stranger. He was neither a necessary nor a proper party, except as he was an officer of the company and its agent. Havemeyer *vs.* Superior Ct., 84 Cal., 385. We may test the question as to whether he was a party in the sense now claimed by inquiring whether the litigation instituted by Drew rendered Tinsley's presence necessary or proper to the rendition of a judgment. Plainly it did not. We may test the question further by supposing that all persons who were creditors of the corporation, or who held any of its property in pledge or otherwise under adverse claims, had been made parties, and by inquiring whether the judgment in the action could have determined their rights against the company, and whether they could have been compelled by summary process to pay over claims to a Receiver appointed *pendente lite*, or to turn over to such Receiver property so held by them to await the determination of the action. This inquiry answers itself. It would be utterly inadmissible under the administration of law as known to us to hold that the mere appointment of a Receiver of the property of a corporation confers upon a Receiver the right to a determination of all conflicting claims in the firm assets by summary proceedings and the enforcement

of the determination by commitment for contempt. This is so for the manifest reason that such adverse claims are not the subject of the action in which the Receiver is appointed, and even though the claimants were made parties, they are not proper parties to the actual controversy, and cannot be converted into parties to a controversy not set up. The Court, therefore, was without jurisdiction respecting their claims.

Jurisdiction means something more than that a party has been brought before the Court, or that the Court has a general jurisdiction of the subject matter—it requires that the particular subject matter shall have been brought into issue in the particular action before the Court.

In Windsor *vs.* McVeigh, 93 U. S., 274, this Court, by Mr. Justice FIELD, stated the doctrine as follows:

"Though the Court may possess jurisdiction of a cause "of the subject matter and of the parties it is still limited "in its modes of procedure and in the extent and charac- "ter of its judgment. It must act judicially in all things "and cannot then transcend the power conferred by the "law. If, for instance, the action be upon a money de- "mand, the Court, notwithstanding its complete jurisdic- "tion over the subject and parties, has no power to pass "judgment of imprisonment in the penitentiary upon the "defendant. If the action be for libel or personal tort, "the Court cannot order in such a case a specific perform- "ance of a contract. If the action be for the possession "of real property the Court is powerless to admit in the "action the probate of a will."

Frequent illustrations of the application of this principle are to be found. The cases are familiar and need no extended discussion.

Reynolds *vs.* Stockton, 140 U. S., 254.
Bigelow *vs.* Forrest, 9 Wallace, 339.
Seamster *vs.* Blackstock, 83 Va., 232.
Risley *vs.* Phœnix Bank, 83 N. Y., 318.
Shaw *vs.* Broadbent, 129 N. Y., 114.
Stanwood *vs.* Hubbell, 23 N. Y., 520.
Allen *vs.* Farmers' Loan & Trust Co., 18 App. Div., 27.
Black on Judgments, 242.

We may therefore conclude that Tinsley was not a party to the action in any such sense as gave the Court jurisdiction to pass upon the validity of the pledge to him or of his right to possession thereunder. Hence he is to be treated in this regard as though he were not a party at all but were a mere stranger, and the authorities cited above in paragraph (1) of this subdivision apply.

(3.) Nor can it be successfully contended that the institution of the action before the making of the pledge by the corporation alters the situation. The commencement of the action did not suspend the powers of the corporation or of its officers. It might still proceed with its business and raise money for its legitimate purposes, and the raising of money for its current expenses, to bury the dead, to prosecute suits, to protect and defend itself against pending litigation (Case 632, p. 3) was within the power of the corporation and its officers. Nor does it appear that a pledge of the corporate property duly authorized by the directors and stockholders to secure such loan would be invalid. At any rate these acts would not be void, and if voidable they could be avoided by the corporation or its Receiver only by legal proceedings lawfully brought for that purpose. The title of the Receiver related only to the date of his appointment. He took the property as of that date subject to such rights of action as the corporation had, or as he was clothed with by statute.

Matter of Schuyler S. S. Co., 136 N. Y., 169.
Conn. River B. Co. *vs.* Rockbridge Co., 73 Fed. Rep., 709.
Storm *vs.* Waddell, 2 San. Chan., 494.
Matter of Muehlfeld, 12 Ap. Div. N. Y., 492.
Same case, 16 App. Div. N. Y., 401.
Beach on Receivers, § 217.

(4.) The jurisdiction to make the order cannot be sustained upon the ground that the proceeding was in effect an independent action brought by the Receiver to try the title or right of possession The answer to this contention is (1st) that this is not an independent action, but an application practically for execution in aid of the enforce-

ment of an order made in an action. It is not possible to convert a proceeding for execution into a proceeding to determine the right to a judgment anterior to the execution for the manifest reason, as we have already shown, that the subject-matter of the one application is not such as to afford the Court jurisdiction to determine the other matter; but (2d), if the direct object of the summary proceeding was to determine Tinsley's property rights or his right of possession, the Court would have no jurisdiction to determine that action without the ordinary procedure of a trial as established by the Courts of Texas.

It goes without saying that there was no reason why the Receiver should not have resorted to an action of replevin to recover the notes and the minute book if he had the legal title, or to an action in equity to recover these articles, and the so-called trust fund, if it were necessary to set aside an illegal transfer. The Courts of Texas afford adequate remedies according to the course of the common law and of equity, as modified by statutes. The law of Texas recognizes no right to trial of title or right of possession by summary proceedings on an order to show cause, and to a judgment enforceable by an immediate commitment to compel the delivery of the property.

A course of procedure in a civil action in substance at least following that which is required by the course and practice of the courts must be regarded as a substantial element of jurisdiction and a complete departure from the prescribed formalities, even though the parties were actually present in court would divest the court of jurisdiction to render any judgment. This has been many times held by this court.

Ex Parte Lange, 18 Wallace, 163.
Ex Parte Bain, 121 U. S., 1.
Hopt *vs.* Utah, 110 U. S. 574.
Edrington *vs.* Pridham, 65 Tex., 617.

In the case last cited the Court said:

"It is plain that such court has jurisdiction to render "a particular judgment only * * * when in its mode "of procedure to the determination of the question of his

"guilt or innocence * * * the court keeps within the "limitations prescribed by law customary or statutory. "When the court goes out of these limitations its action "to the extent of such excess is void. Proceeding within "these limitations its action may be erroneous but not "void."

Mr. Cooley in his work on Constitutional Limitations (p. 257), speaks on this subject as follows:

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs (Cooley on Cons. Lim., p. 357).

In Windsor *vs.* McVeigh, 93 U. S., 277, 282, Mr. Justice FIELD says:

"So also a departure from established modes "of procedure will often render the judgment void; "thus the sentence of a person charged with felony upon "conviction by the Court without the intervention of a "jury would be invalid for any purpose. The decree of a "Court of equity upon oral allegations without written "pleadings would be an idle act of no force beyond that "of an advisory proceeding of the Chancellor. And the "reason is that Courts are not authorized to exert their "powers in that way. The doctrine stated by counsel is "only correct where the Court proceeds after acquiring "jurisdiction of the cause according to the established "modes governing the class to which the case belongs and "does not transcend in the extent or character of its judg-"ment the law which is applicable to it."

This is forcibly illustrated in Edrington *vs.* Pridham, 65 Tex., 617, where the Court attempted in a proceeding to punish for contempt to enter a judgment for a sum of money and award execution. The judgment was reversed. The Court said: "Valuable rights in the practice and mode of procedure may depend upon the nature of the proceding. These rights are lost if the case is treated by the Court and the parties in its progress and trial as one kind of suit, and in the final judgment it is treated by the Court as another sort of suit."

In Hovey *vs.* Elliott, 167 U. S. 409, 417, Mr. Justice White speaking for the court quotes with approval the language of Story on the Constitution, Vol. 2, Sec. 1789, commenting upon the clause in the 5th amendment where it is declared that no person shall be deprived of life, liberty or property without due process of law, in which he affirms:

"That this clause in effect affirms the right of trial "according to the process and proceedings of the common "law."

And in Lowe *vs.* State of Kansas, 163 U. S., 81, where the question was whether the statute of that State as applied by the Supreme Court controvened the 14th amendment, the Court announced as a test for such case the following:

"Whether the mode of proceeding prescribed by this "statute and followed in this case was due process of law "depends upon the question whether it was in substantial "accord with the law and usage of England before the "Declaration of Independence, and in this country since it "became a nation in similar cases."

In C. B. & Q. R. Co. *vs.* Chicago, *supra*, Mr. Cooley is quoted as follows:

"Due process of law in each particular case means such "an exertion of the powers of government as the settled "maxims of law permit and sanction, and under such safe-"guards for the protection of individual rights as these "maxims prescribe for the class of cases to which the one "in question belongs."

The case at bar is a controversy between adverse parties over the right to control and hold possession of certain property. To settle such a question at a summary contempt hearing is contrary to the settled maxims of law and deprives the party in possession of the requisite safeguards. In the same case Story is quoted as follows:

"Due process of law requires, first, the legislative act "authorizing the appropriation, pointing out how it may "be made * * * and secondly, that the parties or "officers * * * shall keep within the authority con-"ferred and observe every regulation which the act makes

"for the protection or in the interest of the property "owner."

While that language is used regarding the appropriation of property for public use, it on principle applied with greater force to the taking of property from one person without compensation and giving it to another person, as in the case at bar. Is it not as essential to the protection of the property owner in a suit between individuals, or between a Receiver and such property owner, or a person in possession of property that the Court should keep within the authority conferred and regulations imposed by the Legislature as that the "parties and officers," referred to by Mr. Story, should do so? In the same case, the Court observes that a judicial proceeding, which was under consideration in that case, might be as arbitrary and inconsistent with due process of law as a legislative enactment, and as to the latter, says:

"In Davidson *vs.* New Orleans, 96 W. S., 97. it was "claimed that a statute declaring in terms, without more, "that the full and exclusive title to a described piece of "land belonging to one person should be and is hereby "vested in another person, would, if effectual, deprive the "former of his property without due process of law, "within the meaning of the 14th amendment. Such "an enactment would not receive judicial sanction in any "country having a written constitution distributing the "powers of government among three co-ordinate depart- "ments, and committing to the judiciary expressly or by "implication, authority to enforce the provisions of such "Constitution. It would be treated, not as an exertion of "legislative power, but as a sentence—an act of spolia- "tion. * * * "

In Citizen's Sav. & L. Asso. *vs.* Topeka, 87 U. S., 20 Wall., 655, 663 (22, 455, 461), Mr. Justice MILLER, delivering the judgment of this Court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said:

"The theory of our Governments, State and National, "is opposed to the deposit of unlimited power anywhere. "The executive, the legislative and the judicial branches "of these governments are all of limited and defined "powers. There are limitations on such power which "grow out of the essential nature of all free govern- "ments."

The possession of property by one person cannot be encroached upon by an arbitrary order of the judicial department made wholly in defiance of the modes for reaching judgment authorizing dispossession prescribed by the legislative department, without violating the fundamental principle which requires co-ordinate departments to refrain from interference with the independence of the other; and the position that an inferior Court can take property from one individual and bestow it upon another, without his permission and without following the modes prescribed by law, either common, statutory or constitutional, and without the right in any appellate Court to review its arbitrary action because it is doue under the guise of a contempt proceeding, which invests it with unlimited power to maintain its dignity and enforce its decree, is utterly inadmissible in any community assuming to be governed by law. Such jurisdiction is not conferred with the summary power to commit and punish for contempt as a part of the law of the land within the meaning of the Constitution.

The exercise of such power is further contrary to the statutes and Constitution of Texas, the paramount guides in ascertaining Tinsley's rights.

"The 14th Amendment, 'as was said in Mo. *vs.* Lewis, "101 U. S., 31,' does not profess to secure to all persons in "the United Stat s the benefit of the laws and the same "remedies. Great diversities in these respects may exist "in two States separated only by an imaginary line. On "one side of this line there may be a right of trial by "jury, and on the other side no such right. Each State "prescribes its own modes of judicial proceeding."

And again in Walker *vs.* Sauvient, 92 U. S., 90, this Court, discussing whether the right of trial by jury in State Courts was secured by that amendment, said:

"This requirement (due process of law) of the consti-
"tution is met if the trial is had according to the settled
"course of judicial proceedings. Due process of law is
"process according to the law of the land. This process
"in the States is regulated by the law of the State."

While, as held in McKane *vs.* Durston, 153 U. S., 687, "an appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal," nor were the further rights of trial by jury, of being sued in the county of one's residence, and of removing a case into the Federal Court, secured in all cases of common law, they are we maintain necessary elements of "due process of law" in Texas, because its constitutional and statutory law makes them essential in all proceedings involving the deprivation of liberty or property. It should not be necessary to argue that these are substantial rights, safeguards erected for the protection of the citizen against the arbitrary power of inferior Courts—especially the right of jury trial and appeal. The Constitution gives the right of jury trial in all civil cases, and the right of appeal in all such cases originating in the District Court (Art. 1, Sec. 15, and Art. 5, Sec. 6).

The United States Court of Appeals in Coles *vs.* Northrup, 66 Fed., 831, recognizes this as a general rule. The Receiver in that case sought an order requiring Cole to deliver possession of certain real estate which was granted by the trial Court. The Appellate Court said:

"The appellant contends that on the issue whether he
"held the property in question as owner in his own right,
"or as a tenant of the Receiver, he was entitled to a trial
"by jury, and we think he was. * * * The cause is
"remanded, with instructions to dismiss the petition of
"the Receiver, but without prejudice to his right, under
"the direction of the Court, to institute proper proceed-
"ings at law to recover the property in controversy."

This has been held in Texas, by the provisions of the Constitution, to apply to all issues involving property rights in Ham *vs.* Live Stock Co., 35 S. W., 427. The ruling of this Court in Wong Wing *vs.* U. S., 163 U. S., 228, that because of the language of the 5th and 6th Amendments,

the persons of Chinese could not be subjected to infamous punishment at hard labor, or their property confiscated, without a jury trial, in principle supports the construction of the Texas Constitution by the Texas Court. It is true that construction does not destroy the Court's power to decide for itself questions of contempt without interference by jury trial of appeal, but it does effectually limit that power within its proper bounds; it prevents the exercise of such power so as to dispose by that means of property rights.

The Texas statute further specifically provides for imprisonment as a means to enforce delivery of specific property sued for, after a judgment has been obtained in a regular suit (Rev. St., Art 1339). We think this excludes any other process for attaining that end. Again the statutes provide elaborately and in detail means for getting possession of property upon filing suit and means for preventing the party in possession from transferring the property pending litigation. There is a special chapter on the "Trial of the Right of Property" where the plaintiff can get immediate possession upon giving bond and the defendant can replevy. Shall all this be abrogated to foster the one process of contempt? To seize property not in the possession of the company or Receiver by a contempt proceeding and thus dispose of it is against the whole theory of Texas jurisprudence. It is to render useless all the judicial machinery for attaining justice, that the legislature has been years in improving. It is to ignore all the checks and balances the legislature has seen fit to invent as necessary to secure the rights of the party in possession.

IV.—Moreover, the petition in the United States Circuit Court contained the averment that petitioner had not then and never had possession or control since the application for the Receivership was made if certain of the notes mentioned in the judgment. This averment was not controverted and it must be taken as true in this Court.

Kohl *vs.* Lehlback, 160 U. S., 296.
Whitten *vs.* Tomlinson, 160 U. S., 231, 242.

Thus, in effect, the appellant was sentenced to an indefinite imprisonment. An order of that character was beyond the power of the Court to make.

Ex parte Keasby, 34 S. W., 364, 365.
Edrington *vs.* Pridham, 65 Tex., 617.
Ex parte Robinson, 19 Wall., 505.
State *vs.* Kaiser, 8 L. R. A., 584.

V.—As to the so-called trust fund the answer interposed in the contempt proceeding as well as the petitions for habeas corpus show that the contention by Mr. Tinsley was that the fund had been misappropriated by Wisby, and that his (Tinsley's) liability therefor arose from his having assumed the liability, and that there was no such fund in his possession, but that he had made an investment in vendor's lien notes as provided by the charter of the Company which he was prepared to turn over to the Receiver, but which the Receiver refused to accept (Case 632, pp. 14, 26, 28; Case 633, pp. 36, 4).

Thus there was presented as to this fund simply a question as to getting in the assets of the company by the Receiver. Could he collect a debt by summary proceedings and contempt? Concededly no. Could the question whether Tinsley had this money in his possession as specific property of the corporation, or whether he owed it as a debt by reason of his assumption of Wisby's liability, be determined by a summary proceeding, and by contempt? Plainly no, if the argument advanced above is correct.

VI.—The imprisonment under the commitment is illegal for the further reason that the order directing the delivery of the property also directed the issue of the commitment before there had been any refusal upon the part of Tinsley to comply with the directions to deliver the property specified. The order to show cause was two fold. First, why he should not be punished for contempt in disobeying the order of April 13d, and why he should not be committed for such a disobedience "as an aid to the en-
" forcement of the decree until compliance by him there-

" with in the particulars of disobedience by the aforesaid " affidavit."

This was equivalent to an order to show cause why he should not deliver the property specified, and the Court proceeded summarily to try this question and made its decree directing him to deliver a portion of the property. It could not with certainty be known how much of his contention would be sustained and how much disallowed. In point of fact a large part of his contention was sustained. Nevertheless without service of the judgment or notice to the appellant or demand the order directing that a commitment issue forthwith to carry the judgment into effect. The Court anticipated the default and commited the appellant in anticipation of the disobedience. The commitment was therefore void. A man cannot be convicted of an offense in anticipation of its being committed.

In re Chiles, 22 Wall, 157-169.
Brinkley *vs.* Brinkley, 47 N. Y., 40, 46.
Rive *vs.* Ehele, 55 N. Y., 518.
First Nat'l Bank *vs.* Fitzpatrick, 80 Hun, 75.
Fromme *vs.* Jarecky, 77 St, Rep. (N. Y.), 1087.

VII.—Considering the order now as having been made to punish a disobedience of the previous order as a contempt of Court, we submit, apart from the considerations already urged, that the order in this particular is void, for the reason that the Court had no authority to inflict the punishment directed. The order adjudges Tinsley guilty of a contempt of Court in having wilfully disobeyed the order made April 23, 1896, by failing and refusing to turn over to the Receiver the property described, and it is thereupon adjudged that Tinsley " pay to the Sheriff of Harris County, Texas, a fine of $100 as a punishment for the contempt aforesaid * * * and that in default of immediate payment of said fine * * * he be imprisoned in the common jail of Harris County, Texas, until he shall pay the said fine of $100 as herein directed."

The statute of Texas, under which the order was made, reads as follows:

"The District Courts shall also have power to punish by fine not exceeding $100, *and* by imprisonment not exceeding three days, any person guilty of contempt of such Court" (R. S. Texas, Art. 1101, p. 254).

It is respectfully submitted:

First.—That the punishment in this case was illegal and unauthorized, because the prisoner was committed until the fine imposed be paid, without regard to the limitation of three days imposed by the statute; and

Second.—For the reason that if the statute is not to be construed as limiting the duration of imprisonment as a means of collecting the fine, then the order was void because it departed from the statute in imposing a fine merely.

First.—The meaning of the statute plainly is that the Court shall have power to fine and imprison a contemnor, but that the imprisonment shall be limited to a period of three days only, and that the imposition of the fine shall not extend the period of imprisonment. In the opinion of the Court below, it is said (Case, 633, p. 72), "It will be noted that the Court, in exercising its punitive authority, only fined the relator $100. It imposed no imprisonment as a penalty." The opinion proceeds upon the theory that the commitment until the fine is paid was not punishment, but merely a mode of collecting the fine, although it seems to be conceded that if there had been any punishment by imprisonment it could have been only for three days, and in that event, the fine, if not paid, could have been collected otherwise than by commitment.

It may be conceded that at common law a fine imposed either criminally or civilly could be collected by arrest and imprisonment. But a fine imposed in a criminal action can also be collected by action.

6 Ohio St., 604.
Rex *vs.* Woolf, 2 B. & Ald., 609.
Rex *vs.* Carlisle, 1 D. & R., 474.

Generally in this country by statute or under the common law, a fine is treated as a sort of judgment debt.

Bishop's Criminal Proc., Sec. 1304.

The Texas statutes provide a method for the collection of fines by actions to be brought by the Sheriff. While, therefore, the imposition of a fine alone implies authority to collect it by commitment, yet, when the penalty is both fine and imprisonment, that implication is repelled, and the legislative intent, from the language, is that the term of imprisonment prescribed should constitute the only imprisonment under the sentence. By statute a Sheriff who fails or refuses to make a return of process "shall be fined for a contempt" (Rev. Stat., Art. 4917), and it is said that in these cases, as also in cases of defaulting jurors, who are also subject to fine (Rev. Stat., Art. 3186), the proper practice is to enter a judgment *nisi* for the amount of the fine, and *sciri faceas* is issued commanding the person against whom judgment *nisi* is rendered to appear at the next term and show cause why judgment for the fine shall not be made absolute against him (Crow *vs.* The State, 24 Tex., 12). A different view of the statute seems to have been taken in the Appellate Court (*ex parte* Robertson, 27 Tex. App., 628), but there the fine was imposed as indemnity and not as punishment.

Statutes of this character are ordinarily disjunctive "fine or imprisonment," as in the provisions of the U. S. R. S., 725. In that case, the punishment by fine stands as though it were unaccompanied by any other direction. But, in the Texas statute, the language is conjunctive. The fine, therefore, is not to be separated from the imprisonment, and the distraint of liberty and the deprivation of property are combined together, and each is limited. The duration of the imprisonment cannot, therefore, be enlarged by the imposition of the fine. That this is so is apparent, from the fact that it is well settled by the Texas Courts, that where the statute directs the imposition of a fine *and* imprisonment, the imposition of a fine alone is unauthorized, and a sentence to that effect is illegal.

Fowler *vs.* The State, 9 Tex. App., 149.
Sager *vs.* The State, 11 Tex. App., 110.
Johnson *vs.* The State, 18 Tex. App., 7.

It seems therefore to be clear that if this statute is before the Court for construction, its plain meaning is that the contemnor must be fined and imprisoned and that the imprisonment cannot exceed three days. In the case at bar, the prisoner had been in confinement for more than thirty days when the writ of habeas corpus was granted.

But it may be said that this Court is not at liberty to construe the statute, and is bound by the construction placed upon it by the Texas courts. While it is freely conceded that the rule in this Court is that it will follow the construction placed upon State statutes by the highest Court of the State, yet where the construction placed upon the statute by the State Courts is not uniform, and especially where there is no construction of the particular statute by the highest Court of the State, this Court may properly construe the statute according to its own understanding of the true intent.

Bell *vs.* Morrison, 1 Pet., 351.
Burgess *vs.* Seligman, 107 U. S., 20-34.

So far as we have been able to ascertain there has been no construction of this statute by the Supreme Court of Texas, and none by the Appelate Court except as above stated.

Second.—The order was void if it imposed merely a fine.

The Court was without discretion in the matter of imposing both a fine and imprisonment. The amount of the fine up to $100 was within its discretion and the period of imprisonment up to three days was within its discretion, but it had no discretion to imprison without fine or to fine without imprisonment. It was bound to apply the statute according to its precise language, and a departure from the statute rendered its action void.

Ex parte Bennett, 7 Pac., C. L. J.
Gurney *vs.* Tofts, 37 Mo., 130.
U. S. *vs.* Vickery, 1 Har. & Joh., 427.
State *vs.* Mooney, 27 West Va., 546.
Bishop on Criminal Law, Sec. 941.
Black on Judgments, Sec. 258.

Fowler *vs.* The State, 9 Tex. App., 149.
Sager *vs.* The State, 11 Tex. App., 110.
Johnson *vs.* The State, 18 Tex. App., 7.
Bigelow *vs.* Forrest, 9 Wall, 339.
Ex parte Lange, 18 Wall. 163.
In re Bonner 157 U. S. 242.
In re Mills 135 U. S. 263, 270.

The complaint of the ~~contemnor~~ appellant, of course, is not that he has not been punished by imprisonment as well as fine, in the sense that additional punishment should have been imposed, but in the sense that the punishment should have been properly apportioned between the fine and imprisonment. If a fine of $100 was the measure of his offense, then something less than the fine should have been imposed upon him together with an imprisonment for some period. In deciding as to the legality of the punishment, the ability of this particular prisoner to pay or not to pay is wholly immaterial. The statute is to be construed in the light of its general application. It was the possibility of abuse of arbitrary power which was aimed at by the statute. It was to prevent a Judge from imposing an undue penalty for what he might regard as a contempt of the dignity of the Court. For this reason the amount of the fine and the term of the imprisonment were limited. It was because a person incapable of paying the fine might be imprisoned for an indefinite period that the limitation was put upon the power of imprisonment.

The sentence imposed being without authority of law, it was void, and the prisoner was entitled to be discharged on habeas corpus.

In re Bonner 157 U. S. 242.
In re Mills 135 U. S. 263, 270.
People *vs.* Carter, 48 Hun. (N. Y.) 166.
People *vs.* Liscomb, 60 N. Y. 559.
Commonwealth *vs.* Newton, 1 Grant (Pa.) 453.
Ex parte Lange, 18 Wall.
Ex parte Degener, 30 Tex. App., 566.

II.

The order and commitment being void, the appellant was deprived of his liberty by the State without due process of law and was entitled to his discharge on habeas corpus.

(1.) The 14th amendment extends to the judicial functions of a State. A Judge exercising such functions under the authority of the State is the State within the meaning of the Constitution. It is no reply to say that the powers conferred upon the Court or Judge are such as are not repugnant to constitutional restrictions. The exercise of judicial powers which are in excess of the legitimate powers conferred by law, whereby a person is deprived of life, liberty or property is a violation of the due process guaranteed by the Constitution.

The law upon this subject is stated by this Court through Mr. Justice HARLAN in Chicago, B. & Q. R. R. Co. *vs.* Chicago, 166 U. S., 226-233, in these words:

"It must be observed that the prohibitions of the "amendment (14th) refer to all the instrumentalities of "the State, to its legislative, executive and judicial "authorities, and therefore whoever by virtue of public "position under a State government deprives another of "any right protected by that amendment against depriva- "tion by the State 'violates the constitutional inhibi- "'tion; and as he acts in the name and for the State and "'is clothed with the State's power his act is that of the "'State.' 'This must be so or as we have often said the "constitutional prohibition has no meaning and 'the "'State has clothed one of its agents with power to annul "'or evade it.'"

Again, in the same case (p. 234), the Court says:

"But a State may not, by any of its agencies, disregard "the prohibitions of the 14th amendment. Its judicial "authorities may keep within the letter of the statute "prescribing forms of procedure in the Courts, and giving "the parties interested the fullest opportunity to be

"heard, and yet it might be that its final action would be "inconsistent with that amendment. In determining "what is due process of law, regard must be had to sub- "stance not to form. This Court, referring to the 14th "amendment, has said: 'Can a State make anything due "process of law which by its own legislation it chooses to "declare such? To affirm this is to hold that the prohibi- "tion to the States is of no avail or has no application "where the invasion of private rights is affected under "the forms of State legislation' (Davidson *vs.* New "Orleans, 96 U. S., 97). The same question could be pro- "pounded and the same answer should be made in refer- "ence to judicial proceedings inconsistent with the require- "ments of due process of law."

This statement of the law is supported by the decisions of this Court.

Ex parte Virginia, 100 U. S., 339, 346, 347.
Neil *vs.* Delaware, 103 U. S., 370.
Yick Wo *vs.* Hopkins, 118 U. S., 356.
Gibson *vs.* Mississippi, 162 U. S., 565.
Scott *vs.* McNeal, 154 U. S., 34.

(2.) The test whether a judicial proceeding violates the "due process" secured by the Constitution is to be found in its jurisdiction to do the act complained of. It is not claimed that every error in the course of a judicial proceeding by which a party is deprived of what he may regard as or what he may ultimately show to be a just administration of the law is such a departure from due process as will amount to an infringement of the protection afforded by the constitutional limitation.

But where a Court or Judge undertakes to deprive a person of life, liberty or property without having jurisdiction to do so, the act is unauthorized and void.

If the constitutional limitation regarding due process has application to judicial proceedings, then such proceedings at least as are absolutely void having the effect of judicial authority' but really arbitrary and not judicial in character, are within its restrictions. As to this proposition, if there ever was any doubt it cannot be said that it any longer exists.

Hovey *vs.* Elliott, 167 U. S., 409.

Chicago, B. & Q. R. R. Co. *vs.* Chicago, 166 U. S., 226.
Windsor *vs.* McVeigh, 93 U. S., 277.
People *ex rel.* Tweed *vs.* Liscomb, 60 N. Y., 559.
Ex parte Neilson, 131 U. S., 176.
In re Sawyer, 124 U. S., 200.
Ex parte Wilson, 114 U. S., 417.
Ex parte Bain, 121 U. S., 1.
Ex parte Fiske, 113 U. S., 713.

(*c.*) On habeas corpus the prisoner may show that the order under which he is held is void, and if it is, he is entitled to discharge.

While the writ of habeas corpus cannot be used to take the place of a writ of error or of an appeal for the purpose of correcting irregularities in the proceedings of another Court, yet the Court whose duty it is to issue the writ of habeas corpus may inquire whether the party is deprived of his liberty under an unauthorized process of the Court, and if there was no legal power to render the judgment or decree or to issue the process under which he is held, then it follows that there was no competent Court, and consequently, no judgment or process, and that he is held without due process of law, and is, therefore, entitled to his discharge.

This proposition may be stated without qualifications and without hesitation. The difficulty arises in its application in determining whether in a particular instance the judgment was void or the process unauthorized. Perhaps the question is discussed nowhere more fully than by Mr. Justice FIELD in *In re* Bonner, 151 U. S., where it was held that a person who had been convicted of larceny and sentenced to imprisonment for one year and the payment of a fine, with directions that he should be imprisoned in the State Penitentiary, was held to be entitled to be discharged upon habeas corpus because the statute under which he was sentenced, although it authorized the fine and imprisonment, did not authorize confinement in the penitentiary. It was there said :

"The person is ordered to be confined in the peniten-

"tiary, where the law does not allow the Court to send "him for a single hour. To deny the writ of habeas "corpus in such a case is a virtual suspension of it; and "it should be constantly borne in mind that the writ was "intended as a protection of the citizen from encroach- "ment upon his liberty from any source, equally as well "as from the unauthorized acts of Courts and Judges as "the unauthorized acts of individuals. The law of our "country takes care, or should take care, that not the "weight of a Judge's finger shall fall upon anyone except "as specifically authorized" (p. 259).

In the Matter of Fisk, 113 U. S., 713, where the petitioner was held under a commitment issued in proceedings for contempt in refusing to appear and submit to examination as a party before trial pursuant to an order made by the United States Circuit Court, in a case where such examination was not authorized by the practice in that Court, although it was by the practice in the New York Court from which the case had been removed, the prisoner was discharged. Mr. Justice MILLER in rendering the decision of the Court said:

"When, however, the Court of the United States un- "dertakes by its process of contempt to punish a man for "refusing to comply with an order which that Court had "no authority to make, the order itself being without "jurisdiction is void, and the order punishing for "the contempt is equally void. It is well set- "tled now in the jurisprudence of this Court "that when the proceeding for contempt in such a case "results in imprisonment this Court will, by its writ of "habeas corpus discharge the prisoner. It follows neces- "sarily that on a suggestion by the prisoner that for the "reason mentioned the order under which he is held is "void, this Court will, in the language of the statute, 'make "inquiry into the cause of the restraint of liberty.'"

Other illustrations of the power and duty of the Court to discharge upon habeas corpus where the prisoner is held under void proceedings are found in

In re Sawyer, 124 U. S., 417.
Ex parte Neilson, 131 U. S., 176.
Ex parte Bain, 121 U. S., 1.
In re Wilson, 140 U. S., 575.
Ex parte Rowland, 104 U. S., 608.

There are certain cases, however, which may be cited in this connection as though they lay down some principle inconsistent with the general proposition stated above. Among these are *Ex parte* Parks, 93 U. S., 18; *Ex parte* Yarbrough, 110 U. S., 657; *In re* Coy, 127 U. S., 731; *In re* Chapman, 156 U. S., 211.

In *Ex parte* Parks, it appeared that the prisoner was held under a conviction of the crime of forgery alleged to have been committed in proceedings in bankruptcy under the Bankruptcy Act. He applied to this Court for a writ of habeas corpus, which was denied upon the ground that the District Court had jurisdiction to determine whether the writing alleged to be a forgery was or was not a forgery within the meaning of the statute, and that upon habeas corpus this Court could not review the determination on that question of law. And to the same effect are the Matter of Yarbrough, *supra*, *In re* Coy, *supra*, and other cases.

But in the case at bar the question is whether the Court had jurisdiction to determine that the Receiver was entitled to possession of the property, and whether it had jurisdiction to determine that question by a summary proceeding. The cases cited would be like the case at bar if the questions there had been whether the offence charged was a crime at all, and if so whether the Court by summary proceedings could convict and punish for it.

Other case, of which *In re* Chapman, *supra*, is an instance, has reference to the rules recognized by this Court regarding original applications for the writ of habeas corpus and the discretion to be exercised by the Court in such instances.

The distinguishing feature in the case at bar is that the Court was without jurisdiction as to the subject matter as against the appellant, and that it was without jurisdiction to proceed in the form and manner in which it did proceed or to impose the penalty which it imposed. In each of these particulars there was not merely an irregularity but a want of jurisdiction. The Court had no authority to decide the thing which it did decide, to wit, that the Receiver was entitled to the possession of the property as against the appellant because

the appellant was not a party to that inquiry in any proper sense, or to decide that it could determine that question in a summary proceeding because there is a total absence of law authorizing the hearing and determination of such a question by a summary proceeding or to decide that it could fine and imprison until the fine was paid, because the limit of its power was to fine and imprison not exceeding three days. No decision which the Court could make upon any one of these three questions would bind the parties anywhere upon a collateral attack.

It is believed that any detailed examination of the cases cited above and others to which attention might be directed would be of little help to the Court.

III.

This Court has jurisdiction in each of these cases.

(1.) The judgment of the Court of Criminal Appeals is before this Court on the writ of error because in the proceeding in which it was rendered, the prisoner claimed a right, privilege and immunity under the Constitution of the United States (R. S. U. S., 709).

The issue on the habeas corpus proceedingwas whether the plaintiff in error was deprived of his liberty by due process. The defendant in error set up as a justification for the restraint of the plaintiff in error an order of commitment thereunder. The plaintiff claimed that neither of these constituted due process, and that he was therefore held in violation of his constitutional right.

In his petition he asserted that the judgment was not due process of law, and that he ought not to be and could not be lawfully imprisoned by such proceedings, nor could he be compelled to turn over his property in such a proceeding, for thereby he was deprived of trial by due course of law, and that the judgment and commitment were void and his detention illegal (Case 633, p. 5).

The instances in which this Court has considered the constitutional validity of statutes and judicial proceedings under which a person is held upon a writ of error in proceedings on the application of such person for discharge under the habeas corpus are familiar.

Leeper *vs.* Texas, 136 U. S., 462.
Kurtz *vs.* Moffitt, 115 U. S., 487.
In re Kemmler, 136 U. S., 436.

It is the settled law in Texas that a party has no right to an appeal in a contempt case.

State *vs.* Thurmond, 37 Texas, 341.
Crow *vs.* The State, 24 Texas, 12.
Casey *vs.* The State, 25 Texas, 364.
Jordon *vs.* The State, 14 Texas, 440.

So there is no remedy by appeal to this Court in proceedings for contempt.

Ex parte Chetwood, 165 U. S., 443.
Hayes *vs.* Fisher, 102 U. S., 121.
In re Debs, 158 U. S., 573.

The only remedy available to the plaintiff in error therefore was habeas corpus.

If we are right in our previous contention that the order of commitment was void, and that imprisonment under a void order is a deprivation of a person of his liberty without due process of law, it follows that a constitutional question was presented on the hearing for a discharge under the habeas corpus inasmuch as it appears that that contention was there made both in the pleadings and on the argument.

(2.) The appeal from the order of the United States Circuit Court for the Eastern District of Texas was properly taken to this Court under Section 5 of the Act of March 2d, 1891, which provides that an appeal or writ of error may be taken from the Circuit Court directly to the Supreme Court "in any case that involves the construc-" tion or application of the Constitution of the United " States." On the application for a discharge under the

writ of habeas corpus in the United States Circuit Court the constitutional question was presented on the petition (Case 632, p. 12), the appellant stated the proceedings under which he was held, the order, and commitment against him, and alleged that he was deprived of his liberty, and, if he submitted to the order, would also be deprived of his property without the due process of law in violation of the Constitution of the United States and the Fourteenth Amendment thereto, and to the right of the equal benefit of the law with citizens of the State contrary to the said Constitution, and that the order impairs the obligation of the appellant's contract with the Cemetery Company and was, therefore, contrary to the Constitution (p. 16). The Court thus acquired jurisdiction under § 753 R. S., U. S.

Here was a direct issue to test the validity of the order and commitment in the contempt proceedings upon the ground of their unconstitutionality. There, constitutionality was challenged in a proceeding where the question of constitutionality was practically the only question, and where, if the proceedings had been held unconstitutional, the judgment must necessarily have been just the reverse of what it actually was. There seems to be no doubt of the right of appeal in this case. Appeals directly from the United States Circuit Court to this Court from final adjudications in proceedings for habeas corpus dismissing the petition and remanding the petitioner are found

Palliser *vs.* U. S., 186; U. S., 236.
Ex parte Neilsen, 131 U. S., 176.
Ex parte Cuddy, 131 U. S., 280.
Horner *vs.* U. S., 143 U. S., 570.
Cuningham *vs.* Neagle, 135 U. S., 1.
N. Y. *vs* Eno, 155 U. S., 89.

Inasmuch as there is no right of appeal in proceedings for contempt either in the State Courts or to this Court, this Court having jurisdiction of the habeas corpus proceedings on this appeal will review the whole case.

Where this Court acquires jurisdiction in a case in which the application of the Constitution of the United States is drawn in question, it has jurisdiction of the entire

case and of all the questions involved in it, and not merely of the question of the constitutionality of the law of the United States.

Haner *vs.* U. S., 148 U. S., 570, 577.
Ekin *vs.* U. S., 142 U. S., 651.

Hence, if upon any of the grounds we have presented a constitutional question is presented the Court will review the entire proceeding and if the proceedings are illegal in other respects it will reverse the judgment of the Court below.

JAMES L. BISHOP,
For Appellant and Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

THOMAS TINSLEY, *Plaintiff in Error*,

No. 633. *versus* } In Error to the Court of Criminal Appeals for the State of Texas.

ALBERT ERICHSON, Sheriff of Harris County, Texas.

THOMAS TINSLEY, *Appellant*,

No. 632. *versus* } On Appeal from the United States Circuit Court for the Eastern District of Texas.

ALBERT ERICHSON, Sheriff of Harris County, Texas.

Statement of the Case.

These are companion proceedings, each seeking review of an order discharging a writ of *habeas corpus* heard upon the petition of the relator, Thomas Tinsley; and, for convenience, they will be briefed together, and reference herein made (except as otherwise noted) to the printed record in the cause pending here on error, which involves the same proceedings that are brought under review in the appeal cause.

The State District Court of Harris county, Texas, upon a petition in the nature of a stockholder's and lot-holder's bill, filed by the complainants, for themselves and others similarly situated, against the Houston Cemetery Company, a corporation for purposes of sepulture, and its officers, including its president,

Thomas Tinsley, after hearing had, upon due notice and appearance by the defendants, rendered an interlocutory decree appointing William Christian its receiver for all the property of the cemetery company, and directing the company's officers to deliver over to the receiver, on his demand therefor, the company's property in their custody, including the books, notes and moneys on hand. This interlocutory decree was in accordance with approved precedent.

Loveland's Forms of Fed. Proc., page 244.

The defendants, including Tinsley, took an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, where the decree was in all things affirmed in an opinion by Chief Justice Garrett. Houston Cemetery Co. et al. v. Drew et al., 36 S. W. Rep., 802–805. After the rendition and affirmance of the decree, the receiver, Christian, by informing affidavit, presented to said District Court, in substance, that when the court acquired jurisdiction over the cemetery company's property, Tinsley held in his custody, as the company's officer, the corporate minute book, specified bills receivable or notes, a trust fund destined to the permanent maintenance of the cemetery amounting to four hundred and ninety-two dollars and fifty-two cents ($492.52), a further sum of money amounting to over three thousand dollars ($3,000), and also a certain bank deposit book, all the property of the company; and that Tinsley, notwithstanding a personal demand on him therefor, by informant as receiver, had refused to turn over said property, or any

of it, though having it within his power and ability so to do. (Rec., 13–16, and 29–34.)

Upon the affidavit being filed, the Honorable John G. Tod, Judge of said District Court, to wit, on February 2, 1897, entered a rule against Tinsley to show cause, and on the same day Tinsley accepted service for appearance on February 6, 1897 (Rec., 33, 34). At the appointed time, Tinsley answered the rule, setting up that he had not had the bank deposit book or the fund of over three thousand dollars ($3000); that the company's secretary, Wisby, had misappropriated the trust fund of $492.52, for which respondent had given his receipt to make good that fund, but averring later on, that he had invested said fund in lien notes at a cost of $7.70, to wit, April 26, 1896, being *after the receiver's appointment;* that the company owed him a due bill for $500, and also owed him an advance of $1000 for attorney's fees and expenses incurred *after the filing of said receivership suit;* and that, to secure such indebtedness, the company had given him a lien on said minute book and notes, to wit, April 15, 1896, but there was no averment of any indorsement of the notes so as to put the legal title in him, nor that the lien transaction occurred before the court had acquired constructive custody of the property, the formal order appointing the receiver being made only a few days afterwards, to wit, on April 23, 1896. The answer made no claim that Tinsley did not have all the notes specified in the informing affidavit, but set up that the amount of the notes was $1342, the amount of

them as claimed by the receiver being $1484.50. There was a general allegation of good faith, and also of willingness to turn over the minute book and notes, provided the receiver first paid him the amount of the debt for which he claimed to hold them as security. (Rec., 34–37.)

The receiver, in his reply, traversed the facts set up by the respondent, and, for special replication, averred that the court "had acquired jurisdiction of the entire property of said Houston Cemetery Company before the pretended deposit of the notes and book as collateral, as set forth in said answer." * * (Rec., 37.)

Upon the issues thus tendered and joined the matter was heard by the court on "evidence adduced, both oral and written," wheupon the court did "find and declare that the facts set forth in said affidavit, and the special plea of said replication are true as concerns the minute book, notes, and trust fund of four hundred ninety-two dollars and fifty-two cents, * * and that said respondent, under the evidence adduced, has failed to show cause as required, by the answer aforesaid, good or sufficient in law;" and thereupon the court did adjudge that said Tinsley was guilty of willful contempt in refusing, after due personal demand, to turn over said items of property to the receiver, though having it within his ability and power to comply, and that he—

> "pay to the sheriff of Harris county, Texas, a
> "fine of one hundred dollars, as a punishment
> "for the contempt aforesaid, and that he forth-
> "with turn over and deliver to said William

" Christian, as receiver aforesaid, the said notes " (particularly described in said schedule), min- " ute book, and trust fund of four hundred nine- " ty-two dollars and fifty-two cents, as an aid to " the enforcement to the aforesaid order of April " 23rd, 1896, and that in default of immediate " payment of said fine, and of the delivery and " turning over forthwith to said William Chris- " tian, as receiver aforesaid, of said notes, min- " ute book, and trust fund of four hundred ninety- " two dollars and fifty-two cents, he, the said con- " temnor, Thomas Tinsley, be imprisoned in the " common jail of Harris county, Texas, until he " shall pay the said fine of one hundred dollars, " as herein directed, and until he shall turn over " and deliver to the said William Christian, as " aforesaid—the said sheriff affording him, said " Thomas Tinsley, a reasonable opportunity to " do so, if he shall so desire,—the said notes, " minute book, and trust fund of four hundred " ninety-two dollars and fifty-two cents, and un- " til he shall pay to the sheriff aforesaid his cost " for executing the commitment hereunder, or " until he shall be discharged by the further or- " der of this court." * * * (Rec., 11, 26.)

A warrant of commitment, to carry into execution the judgment of conviction, was duly issued, and under that warrant Tinsley is held in custody, he having never complied, in whole or in part, nor offered to do so, nor sought from the committing court any modification of the terms of the order. (Rec., 6, 21, 22, 28, 29.)

A petition for writ of *habeas corpus*, by Tinsley, was granted by Presiding Judge Hurt of the Court of Criminal Appeals of the State of Texas. This petition set up the proceedings resulting in the relator's

conviction for contempt; and, in addition, averred that he had never had possession of a specified part of the notes, and that he held a lien on the rest of them, as also on the minute book, which was acquired before the appointment of the receiver; that, if liable for the trust fund, he owed the same only as a debt; that the presiding District Judge, who entered the order of conviction, was related within the prohibited degrees to certain cemetery lot-holders, who were not parties to the receivership cause; and that

> " his claim to all the matters and things above set
> " out was and is made in good faith, and that he
> " has the right and does assert the right thereto
> " until deprived thereof by due course of law, and
> " he says that the proceedings on said motion and
> " said judgment are not due process of law, and
> " that he ought not and can not be by such pro-
> " ceedings imprisoned or compelled to turn over
> " said property and things, for that thereby he is
> " deprived of a trial by due course of law, and
> " that said judgment and commitment are there-
> " fore void, and his detention thereunder illegal."

The petition then avers that the judgment of conviction was void, and particularizes the four grounds upon which the claim of nullity rests, stating them to be (1) because the District Judge, under the State statute, was disqualified by his relationship to the alleged lot-holders; (2) because the judgment of conviction is uncertain and indefinite and does not limit or fix the time for confinement, and especially so, because relator can never comply as to the notes not in his possession; (3) because the period of confinement was not limited, under the State statute, to three days;

and (4) because the matters set up in the informing affdavit and judgment of conviction did not and could not constitute a contempt. (Rec., 2–5, 17, 18.)

The said Court of Criminal Appeals, after due hearing, sustained exceptions to the petition and exhibits, and discharged the writ, remanding the prisoner to custody. The opinion of the court, reviewing the subject at great length, is shown by the record. (Rec., 63–73.) Two motions for rehearing were filed, but neither of them specially set up or claimed any Federal right. (Rec., 54, 73.) The arguments for petitioner as well as respondent, on the hearing before the Court of Criminal Appeals, will be found in the record. (Rec., 38, 46, 50, 54, 59.)

The assignments, of error made in this court claim, in addition to the grounds presented in the State court, that the contempt proceedings operated to deprive relator of his liberty, or (if he obeyed), of his property, in denial of due process of law and the equal protection of the law, contrary to the fifth and fourteenth amendments to the Constitution of the United States, and in violation of the treaty between the United States and Great Britain, the relator claiming to be a British subject. (Rec., 75–77.)

THE BRIEF OF THE ARGUMENT.

I.

In respect to the cause on error to the highest court of the State, this court appears to be without any jurisdictional right of review, since no Federal right was specially set up or claimed in the State court, the general averment of want of due process of law amounting to nothing.

It is not an open question in this court that, in a petition for *habeas corpus*, the general averment that the proceedings of conviction deprived the petitioner of due process of law must be regarded as the mere statement of a conclusion by the pleader, and is of no avail.

Kohl v. Lehlbeck, 160 U. S., 293.

Whitten v. Tomlinson, 160 U. S., 231.

Equally well settled is it that, in error to a judgment of the highest court of the State, the Federal right, claimed to have been infringed, must have been specially set up and claimed at a proper time, and in a proper way, in the State court, so as to make it beyond doubt that such right was there denied, and not a mere matter of argumentative inference.

Oxley Stave Company v. Butler County, 166 U. S., 648.

Leeper v. State of Texas, 139 U. S., 462, 468.

The argument of the relator, filed in the State court in support of his petition (Rec., 47, 48), shows be-

yond question that he was relying upon provisions of the Constitution of the State, in his general claim of the proceedings not being according to *due course of law* or due process of law. This is made certain, because, in the argument, the only constitutional claim made was that relator "is entitled under the Constitution to a trial by jury on these issues in the usual method of civil trials, and that he could not be deprived of said property except by due process of law," and that the "Constitution also provides that no citizen in this State shall be deprived of his property except by due process of law. Due process of law is the method and means laid down by the statutes of our State for trial in the courts of the State by a suit regularly instituted, citation, and trial. It is not due process of law to deprive a citizen of his property by contempt proceedings." The relator could not have had in mind the Constitution of the United States, because it is settled that at least the first ten amendments of that instrument, including the seventh, relating to jury trials, operate exclusively upon Federal power.

Eilenbecker v. The District Court of Plymouth Co., 134 U. S., 31.

McElvaine v. Brush, 142 U. S., 155.

Walker v. Sauvinet, 92 U. S., (2 Otto) 90.

II.

In respect to the appeal cause, without regard to the general averments of Federal right as being tantamount to only the pleader's conclusions of law, the Circuit Court properly exercised its discretion in refusing to interfere with the State court's process, and in leaving the relator to his remedy in the State courts, and thence on error to this court.

The authorities in support of the point appear so clear and conclusive that superadded argument would seem to savor of supererrogation.

Ex parte Royall, 117 U. S., 241.

In re Frederich, 149 U. S., 70.

Cook v. Hart, 146 U. S., 183.

Wood v. Brush, 140 U. S., 278.

Whitten v. Tomlinson, 160 U. S., 231.

Pepke v. Cronan, 155 U. S., 100, and cases cited.

In fact, no causes were made apparent by the petition which would authorize a Federal Court to discharge a prisoner in jail on State process.

United States Rev. Stats., Sec. 753.

2 Foster's Fed. Pr., 2nd ed., p. 719.

The general averment in the petition of detention in violation of the Constitution, laws and treaties of the United States, could not be considered, as we have seen.

Ex parte Cuddy, 131 U. S., 280, and cases cited *supra*.

III.

Due process of law is referable to the subject-matter and nature of the particular inquiry; and since the committing court, being one of general jurisdiction, had unquestionable power to render the disobeyed decree, as well as jurisdiction of the person and subject-matter involved in the contempt inquiry, and since it proceeded with such inquiry in the usual course of law applicable to contempt proceedings, in which no jury trial is or ever has been a requisite of the general law of the land, and since it condemned only after full hearing upon proper notice, the claim of denial of due process of law appears utterly untenable.

The committing court, in the instant case, was beyond doubt possessed of ample jurisdiction in the premises, for, being created by the Constitution of the State, it is invested by that instrument with original jurisdiction—

> " of all suits, complaints or pleas whatever, with-
> " out regard to any distinction between law and
> " equity, when the matter in controversy shall be
> " valued at or amount to five hundred dollars,
> " exclusive of interest." Texas Const., Art. 5, Sec. 8, carried into Art. 1098, of Rev. Stats. of Texas (1895).

It is elementary that if the committing court had, and did not exceed, rightful jurisdiction in what it did, the prisoner cannot be discharged on collateral attack by *habeas corpus*, for in such event the judgment is not void, however erroneous or irregular it might be deemed.

Davis v. Beason, Sheriff of Oneida Co., 133 U. S., 333.

Lennon v. Lake Shore, etc., Railway Co., 22 U. S. App., 561, 565, and numerous cases cited from this court.

Church on Habeas Corpus, 2nd ed., Sec. 315.

The procedure adopted, in the contempt matter, was in accordance with strictest technical requirement.

Ex-parte Kirby (Tex. Crim. Ct. App.), 34 S. W. Rep., 635, 962.

Repalje on Contempts, Secs. 93, 94, 95, 103, 104, 111, 120, 125 and 126.

It is deemed too well settled in this court, as well as by the concensus of judicial opinion elsewhere, to admit of argument, that a jury trial is not necessary to due process of law in a contempt inquiry.

Eilenbecker v. Plymouth Co. District Court, 134 U. S., 31.

Walker v. Sauvinet, 92 U. S. (2 Otto), 90.

Rapalje on Contempts, Sec. 112.

Besides, a jury trial is allowable in Texas in no civil matter to which applicable, unless upon compliance with certain prerequisites not shown to have been observed in the instant case.

Revised Statutes of Texas (1895), Art. 3188, providing—

> " No jury trial shall be had in any civil suit un-
> " less an application therefor be made in open
> " court and a jury fee be deposited, or an affi-
> " davit be made of inability to make such de-
> " posit, as hereinafter prescribed."

IV.

The claim of denial of equal protection of the law is without merit, inasmuch as it does not appear that, by any law or course of procedure in Texas, any other person ever had been or ever would be dealt with differently, in similar circumstances and conditions.

The point is believed to be self-evident; but, for completeness of the brief, we cite a few cases declarative of the principle.

Walston v. Nevin, 128 U. S., 578.

Missouri Pacific Railroad Co. v. Mackey, 127 U. S., 209.

V.

The relator's suggestion that he is a British subject presents no new phase of the questions at issue, because it can not be claimed that the treaty with Great Britain made him any less amenable to judicial process for contempt than would be a citizen of this country.

VI.

The claim by relator that his refractory conduct finds justification in the asserted lien on the notes and minute book, is barren of merit, (1) because, within the scope of the contempt inquiry, the fact was adjudicated against him by the committing court; (2) because nothing is shown to impugn the committing court's finding that the incipiency of the lien (if such existed) was after the court acquired

jurisdiction of the fund; and (3) because the contempt conviction operated no adjudication that in any manner militated against the assertion and enforcement of his lien (if he had one) by intervening petition in the receivership cause.

Reference being had to the issues tendered and joined in the contempt matter, it is apparent that the committing court, in point of fact, found against Tinsley's contention, so far as concerned the court's right to the custody of the property through its receiver; and it is certainly not an open question, that matters of fact adjudicated by the committing court can not be tried anew on *habeas corpus*.

Lennon v. Lake Shore, etc., R'y Co., 22 U. S. App., 565, and cases cited.

Davis v. Beason, Sheriff of Oneida Co., 133 U. S., 333.

Church on Habeas Corpus, 2nd ed., Sec. 315.

Again, the informant's replication to Tinsley's answer on the contempt hearing tendered the distinct issue, that the lien transaction occurred after the court had acquired jurisdiction of the property. The committing court found this fact to be true, and that would appear to be an end of the matter, as shown by the authorities cited, *supra*. It is true the relator claimed that the transaction took place before the formal appointment of the receiver, but the inquiry resulting in that appointment had been instituted some time before the appointment was made, and it is thus a fair deduction that the committing court's jurisdiction

over the property considerably ante-dated the formal appointment and qualification of the receiver, in which event it is the settled doctrine in Texas, as well as in the Federal Circuit comprising such territory, that the court's custody would relate back to the incipient step resulting in the appointment, and be unaffected by intermediate liens not acquired by innocent persons without notice.

Riesner v. Gulf, Colorado and Santa Fe Railway Company, 89 Texas, 656, 658 *et seq.*, and cases cited and reviewed.

Independent of the considerations thus far advanced, the sole inquiry on the contempt hearing, in this connection, involved merely the court's right to the custody through its receiver, and not the question whether Tinsley could, by intervening petition in the receivership cause, or by other civil remedy, establish and enforce a lien on the property. There is no claim by the relator that the notes were indorsed to him, so as to put in him the legal title by the law merchant, even if this could affect the question. Hence, to deliver over the property to the receiver could and would impair no pecuniary right claimed by the relator; and it is the settled doctrine in Texas that, where a receiver is appointed, pre-existing liens must be enforced through the receivership.

Ellis v. Vernon Ice, Light and Water Company, 86 Texas, 109.

The insincerity of relator's contention that, if he gave up the custody of the property, he would lose

the lien claim by him, is placed beyond question by the opinion of the Court of Criminal Appeals where the lien matter is thus disposed of:

> " It will be observed, as before stated, that the " relator did not claim the legal title in the notes " or in the minute book, but merely an equity or a " lien thereon to secure his debt. It seems that " he, as an officer of the company, had transferred " to himself as an individual, through the direc- " tion of some of the stockholders, the notes and " minute book in question. The action of the " court in ordering him turn over said property to " the receiver was by no means an adjudication " as to his lien. This, if it was a genuine lien, " would be preserved to him in the hands of the " receiver. The effect of the order was merely " to place these articles, together with all the " property of the corporation, in the hands of the " receiver for administration under the orders of " the court. In our opinion, the court unques- " tionably had the power to do this, and did not " exceed its jurisdiction in making said order." (Rec., 71.)

VII.

The claim of the trust fund not being on hand in kind when the court acquired jurisdiction thereof, is not only destroyed by the committing court's finding of fact to the contrary, but is belied by the relator's admission, in his answer, of having invested such fund in lien notes three days after the receiver's formal appointment.

The distinction between money owing as a debt and money on hand in kind is of a radical difference that can not escape attention. Under the Texas Constitu-

tion forbidding imprisonment for debt, had the committing court found that the trust fund was not on hand when it acquired jurisdiction, it would have remitted the parties to a civil action, as it did in respect to the item of over three thousand dollars. But the idea that money, as property on hand, can not be lawfully ordered by a court into its receiver's custody, and the order enforced by contempt procedure, is a proposition that overleaps and refutes itself. It is enough, however, to call attention to the holding of the Court of Criminal Appeals on this point, which is in these words:

> "As to the fund, if it be not a trust fund, in "possession of relator, but a mere debt, it may "be that it would not be contempt for the court "to have made the order requiring this fund to "be turned over to the receiver. However, that "question was submitted to the court. The rec-"ord shows that proof was heard upon this ques-"tion, and the court below decided that this was "a trust fund in the hands of the relator. If it "be conceded, however, that it was a debt, due "by the relator to the corporation, still, the rela-"tor was in contempt of court as to the remainder "of the property, that is, the balance of the "notes and the minute book, and the order was "unquestionably valid as to these, and the relator "not having responded to the order of the court "as to these matters, we do not feel inclined to "grant him any relief. It would be his duty to "show before this court, in order to obtain relief "by the writ of *habeas corpus*, that he had done "all within his power to comply with that por-"tion of the order of the court which it unques-"tionably had a right to make." (Rec., 71, 72.)

VIII.

The claim by relator that he cannot comply as to part of the notes (if true) is conclusively met by his contumacious refusal to comply with the order, as far as he admits his ability to do so, the rule being well settled that until the relator does this, and then seeks in the committing court modification of the order in other respects, he cannot be relieved on *habeas corpus*.

It is not probably true that Tinsley is without possession of the portion of the notes which he claims not to have had; for, in his answer to the rule to show cause, he makes no point of this sort, merely claiming that the aggregate amount of the notes is not so large as claimed by the receiver, and if those which he now disclaims be deducted from the aggregate, the amount will be reduced way below the figures which his answer showed to represent the notes held by him. (Rec., 36, compare with p. 4.)

Aside from this, however, the proposition we make is believed to be not open to debate, and conclusive against the relator's contention.

Ex-parte Thomas Tinsley, Court of Crim. App., Rec., 71–72.

In re Swan, Petitioner, 150 U. S., 637, 653, the court saying that

> " he can not be discharged on *habeas corpus* un-
> " til he has performed so much of the judgment or
> " served out so much of the sentence as it was
> " within the power of the court to impose. *Ex-*
> " *parte* Lange, 85 U. S. (18 Wall.), 163; *Ex-*
> " *parte* Parks, 93 U. S., 18."

IX.

Since the imprisonment of the relator absolutely ends as soon as he pays the fine and delivers over the property, the claim that the order of conviction was for an uncertain and indefinite term of imprisonment is without any merit.

If the order stood alone upon the direction that the relator be imprisoned "until the further order of the court," we would have a different case. But here the imprisonment ends so soon as the refractory contemnor consents to yield obedience, or, should he not comply, until the further order of the court. The last clause simply guards against embarrassment from lapse of the term or future disability to comply, leaving it in the court's power to discharge him any way should it choose to do so, but not impairing the *ipso facto* discharge arising from obedience. The entire propriety and lawfulness of this order are clear in principle, as well as upon authority.

Church on Habeas Corpus, 2nd ed., Secs. 337, 338, and cases cited.

Repalje on Contempts, Secs. 139 and 130, and cases cited.

X.

The other questions presented appear irrelevant here, as they merely compass supposed rights resting upon provisions of the statutory and organic law of the State, which provisions have been construed by the highest State court adversely to the relator's contention.

It is said the order for delivery of the trust fund item operated imprisonment for debt, in violation of the Texas Constitution, Art. 1, Sec. 18. But the money on hand, as property, was not a debt, and hence the point was denied by the Court of Criminal Appeals, as shown *supra*.

Insistence is made that the imprisonment for contempt was limited, by the State statute (Art. 1101 of Texas Rev. Stats.), to three days. But the highest State court, construing the statute, has held, with the current of authority elsewhere, that the statute has reference to *quasi*-criminal contempt, as a punishment, and not to a civil contempt, where the very authority of the court would be paralyzed if shorn of power to imprison until obedience.

Ex parte Thomas Tinsley, Court of Crim. App. Rec., 72.

Rapalje's Contempts, Secs. 1, 3, 11, 16, 21, and cases cited.

The contention for nullity of the convicting order because of the judge's alleged relationship to persons who had never become parties to the receivership cause, does not appear to have been carried into the assignments in this court. But, if the point be still urged, it is utterly untenable, since the highest courts of the State have construed the statute on the subject adversely to relator's contention.

Ex-parte Thomas Tinsley, Court of Crim. App., Rec., 68.

Houston Cemetery Company v. Drew (Tex. Civ.

App.), 36 S. W. Rep., 802, application for error to State Supreme Court not allowed.

It is to be observed, and it is beyond doubt, that Tinsley need never have gone to jail, and that every moment of his imprisonment has been and is self-inflicted. Whatever may be the avowed or hidden motive of his unfathomable conduct, whether a fear of incriminating evidence in the minute book, or a contemptuous determination to humiliate the committing court, or a sordid hope for indemnity damage as a British subject if declared to have been imprisoned without jurisdiction, or whether his motive be all or none of these, better far, we submit, that he should spend his mortal days behind the bars than be permitted to inflict a mortal wound upon the judicial tribunals of this land.

Repectfully submitted,

PRESLEY K. EWING,
HENRY F. RING,

Attorneys of Record and of Counsel for Defendant in Error and Appellee, Sheriff of Harris County.

Counsel for Parties.

TINSLEY *v.* ANDERSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

SAME *v.* SAME.

ERROR TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS.

Nos. 632, 633. Argued May 5, 6, 1898. — Decided May 31, 1898.

The appellate jurisdiction of this court from a state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a State where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States.

If the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the State having jurisdiction of the case, dismissing the writ of *habeas corpus* issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws or treaties of the United States, it is reviewable by this court on writ of error.

The right to equal protection of the laws is not denied by a state court when it is apparent that the same law or course of procedure would be applied to any other person in the state under similar circumstances and conditions.

When the committing court has jurisdiction of the subject-matter and of the person, and power to make the order for disobedience to which a judgment in contempt is rendered, and to render that judgment, then the appellate court cannot do otherwise than discharge a writ of *habeas corpus* brought to review that judgment, and secure the prisoner's discharge, as that writ cannot be availed of as a writ of error or appeal.

It was competent for the District Court to compel the surrender of the minute book and notes in Tinsley's possession, and he could not be discharged on *habeas corpus* until he had performed, or offered to perform so much of the order as it was within the power of the District Court to impose, even though it may have been in some part invalid.

THE case is stated in the opinion.

Mr. James L. Bishop for appellant and plaintiff in error.

Mr. Presley K. Ewing for appellee and defendant in error. *Mr. Henry F. Ring* was on his brief.

Opinion of the Court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The object of both these proceedings is to obtain the discharge of Thomas Tinsley from imprisonment under an order committing him for contempt, under the following circumstances:

On April 23, 1896, upon a petition for the appointment of a receiver of the Houston Cemetery Company, a corporation of Texas, filed against the corporation, and against Tinsley, who was its president, and the other officers of the corporation, both as such officers and individually, by some, in behalf of all, of the owners of lots in the cemetery, the District Court of the county of Harris in the State of Texas made an order appointing a receiver of all the property of the corporation, and requiring each of its officers, upon demand of the receiver, to deliver to him any books, papers, money or property, or vouchers for property, within their control, to which the corporation was entitled. Upon appeal by Tinsley and the other defendants from that order it was affirmed, on May 21, 1896, by the Court of Civil Appeals of the State. 36 Southwestern Rep. 802.

On February 2, 1897, the receiver made a motion to the District Court to commit Tinsley for contempt in refusing to deliver to the receiver a minute book, promissory notes of the amount of $1440.50, and a trust fund, amounting to $492.52, belonging to the corporation. A rule to show cause was issued, in answer to which Tinsley averred that the notes and the minute book had been delivered by the corporation to him as collateral security for money advanced by him to the corporation, and that he had made, at the expense to himself of $7.70, an investment of the trust fund in securities which he had offered, and was still ready, to deliver to the receiver upon payment of this sum.

On February 6, 1897, the District Court, after taking evidence and hearing the parties, adjudged that Tinsley was guilty of a contempt in disobeying its former order by not delivering to the receiver the minute book, notes and trust

fund, being the property of the corporation and in his control; and ordered him to pay to the sheriff a fine of $100, and to deliver to the receiver the property aforesaid, and to be committed until he should pay the fine and should (being allowed by the sheriff reasonable opportunity to do so if he should so desire) deliver the property to the receiver, or until he should be discharged by further order of the court. And upon the same day he was accordingly committed to the county jail.

On March 17, 1897, he presented to the judge of the District Court a petition for a writ of *habeas corpus*, setting forth the above proceedings, and alleging that the judgment and commitment for contempt were void, and his detention under them illegal for these reasons: That his claim to the notes, minute book and trust fund was made in good faith, and that he had the right thereto until deprived thereof by due course of law, and that the proceedings on said motion and said judgment are not due process of law, and that he ought not and cannot be by such proceedings imprisoned or compelled to turn over said property and things, for that thereby he is deprived of a trial by due course of law; that the judgment and commitment were uncertain and indefinite, and did not limit the time of his confinement under them; that the statute of the State provided that the District Court should not have the power to imprison any person for a longer period than three days for a contempt; and that the matters set up in said motion and judgment did not and could not constitute a contempt. This petition for a writ of *habeas corpus* was denied by the judge of the District Court; but on April 2, 1897, was granted by the presiding judge of the Court of Criminal Appeals of the State of Texas, and a writ of *habeas corpus* issued, addressed to the sheriff, who, on April 8, returned that he held the prisoner under the commitment for contempt.

After full arguments by both parties, the Court of Criminal Appeals entered judgment, dismissing the writ of *habeas corpus*, and remanding him to the custody of the sheriff, on the ground that the order of commitment for contempt was within the power of the District Court, at least so far as concerned the notes and minute book, because Tinsley was a

party to the suit in which the receiver was appointed, and claimed no title, other than by way of lien, in the notes and minute book, and such lien, if genuine, would be preserved to him against the property in the hands of the receiver. 40 Southwestern Reporter, 306.

On April 26, 1897, Tinsley filed a motion to set aside that judgment and for a rehearing, which, after further written arguments in his behalf, was overruled on May 12, 1897.

On May 15, 1897, upon a petition alleging that by the order of commitment, he "is deprived of his liberty, and will be, if he submits to the order, of his property, without due process of law, in violation of the Constitution of the United States," he obtained from the Circuit Court of the United States for the Eastern District of Texas a writ of *habeas corpus* to the sheriff, which, after a hearing, was by the judgment of that court dismissed and the prisoner remanded to custody; and on January 21, 1898, he appealed from that judgment to this court.

On January 31, 1898, he sued out a writ of error from this court to review the judgment of the Court of Criminal Appeals of the State of Texas, and filed in that court an assignment of errors, one of which was that by the proceedings in that court "he was deprived of his liberty, and, if he submitted to the order of the trial court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the Fifth and Fourteenth Amendments thereto."

The two cases now before us are the appeal from the judgment of the Circuit Court of the United States, and the writ of error to the Court of Criminal Appeals of the State of Texas.

The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the Circuit Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a State in violation of the Constitution, a law or a

treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the State, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *In re Frederich*, 149 U. S. 70; *Pepke* v. *Cronan*, 155 U. S. 100; *Bergemann* v. *Backer*, 157 U. S. 655; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284. This case shows no such circumstances as to require departure from this rule.

It was argued in behalf of Tinsley that the judgment committing him for contempt was not reviewable by this court; citing the statement in *Chetwood's case*, 165 U. S. 443, 462, that "judgments in proceedings in contempt are not reviewable here on appeal or error, *Hayes* v. *Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573, and 159 U. S. 251." But that statement was made in regard to such judgments in independent proceedings for contempt in the Circuit Courts of the United States, and the reason is, as in cases referred to in *Hayes* v. *Fischer* above cited, that such judgments were considered as judgments in criminal cases, in which this court had no appellate jurisdiction from those courts. *Ex parte Kearney*, 7 Wheat. 38, 42; *New Orleans* v. *Steamship Company*, 20 Wall. 387, 392.

But the appellate jurisdiction of this court from the state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a State where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. Rev. Stat. § 709. Consequently, if the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the State having jurisdiction of the case, dismissing the writ of *habeas corpus* issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws or treaties of the United States, it is doubtless reviewable by this court on writ

of error. *Newport Light Company* v. *Newport*, 151 U. S. 527, 542; *Pepke* v. *Cronan*, 155 U. S. 100, 101.

We perceive no reason for holding that any such rights were denied by the judgment of the Court of Criminal Appeals, in view of the facts appearing in the record and the grounds on which that court proceeded as disclosed by its opinion.

Counsel asserts that the rights claimed under the Constitution of the United States were the right to due process of law, and the right to the equal protection of the laws.

The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of procedure, which was applied to Tinsley, would have been applied to any other person in the State of Texas, under similar circumstances and conditions; and there is nothing in the record on which to base an inference to the contrary.

Was the right to due process of law denied? If the committing court had jurisdiction of the subject-matter, and of the person, and power to make the order for disobedience to which the judgment in contempt was rendered, and to render that judgment, then the Court of Criminal Appeals could not do otherwise than discharge the writ of *habeas corpus* and remand the petitioner. The writ cannot be availed of as a writ of error or an appeal, and if the commitment was not void, petitioner was not deprived of his liberty without due process of law.

The District Court of Harris County, Texas, was a court of general jurisdiction, and had jurisdiction in the suit against the Cemetery Company and its officers, including Tinsley, who was not a stranger, but a party, to the litigation, after hearing had on due notice and appearance by the defendants, to enter the order appointing a receiver and directing the company's officers to deliver to him, on his demand therefor, the company's property in their custody, including the books, notes and moneys on hand, and to determine on the facts that Tinsley was in contempt in refusing to deliver such property, and assuredly to adjudge this as to so much of the property as he conceded belonged to the company, but the possession of

which he claimed the right to retain only in order to enforce an alleged lien.

The Court of Criminal Appeals held that as Tinsley did not claim the legal title in the notes and in the minute book, but merely an equity or lien thereon to secure his debt; as the order to turn over the property to the receiver was by no means an adjudication as to his lien, which if it was a genuine lien would be preserved to him in the hands of the receiver; and as the effect of the order was merely to place the articles in the hands of the receiver for administration under the orders of the court; the District Court unquestionably had the power to make the order as to these articles, and did not exceed its jurisdiction in so doing. So that even though the $492.52 was not a trust fund in his hands, as the District Court had decided, but a mere debt due from him, because, as he alleged, that sum had been taken by another, and he had simply agreed to make it good, the adjudication of the District Court was nevertheless sustainable apart from that item.

We concur in the view that it was undoubtedly competent for the District Court to compel the surrender of the minute book and notes, in Tinsley's possession, and that he could not be discharged on *habeas corpus* until he had performed or offered to perform so much of the order, as it was within the power of the District Court to impose, even though it may have been in some part invalid. *In re Swan*, 150 U. S. 637.

The other objections suggested require no special consideration. It is said that the imprisonment for contempt was limited by the state statute to three days, Art. 1120, Tex. Rev. Stats., but the state court held that that statute had reference to a *quasi* criminal contempt as a punishment, and not to a civil contempt where the authority of the court is exercised by way of compelling obedience. Rapalje on Contempts, § 21. This is not a Federal question, and we accept the ruling of the state court in its construction of the statute. It is urged that the order of commitment imposed an uncertain and indefinite term of imprisonment; but the order was that Tinsley should be confined until he complied, and the addition,

"or until he shall be discharged by the further order of the court," was merely intended to retain the power to discharge him if the court should thereafter conclude to do so, it being within his own power to obtain his discharge at any time by obeying the order. Nor is there any force in the objection that no trial by jury was awarded, for such trial was not demanded, and a jury trial is not necessary to due process of law on an inquiry for contempt. *Walker* v. *Sauvinet*, 92 U. S. 90; *Eilenbecker* v. *Plymouth County District Court*, 134 U. S. 31; Rapalje on Contempts, § 112.

The judgments of the Circuit Court and of the Court of Criminal Appeals are, severally,

Affirmed.